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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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Attorney for Appellant
Black Construction
Corporation

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BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

QUESTION PRESENTED

Does the imposition by the State of Hawaii of an employment tax on Black Construction Corporation (hereafter "Black") a Nevada corporation engaged in the construction business solely on the island of Guam which maintains no office, does no business, owns no property, and

neither recruits nor hires any employees in Hawaii contravene the due process clause of the Fourteenth Amendment to the United States Constitution?

DESIGNATION OF CORPORATE RELATIONSHIPS

Black Construction Corporation, filing this Jurisdictional Statement as Appellant in this proceeding, states that:

This is the original Designation of Corporate Relationships.

E.E. Black, Ltd. is the parent of Black Construction Corporation.

E.E. Black, Ltd. is also the parent corporation of:

American Piping & Boiler Company
Durant-Irvine Company, Ltd.
REB Corporation
Holert Electric, Inc.
Holert Guam International, Inc.
Black Micro Corporation
International Equipment of Guam
Guam Mechanical Distributors
P.T.E.E. Black Indonesia Construction
P.T. Pacific Prestress Indonesia

DATED: May 11, 1982.

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MISCELLANEOUS

UNEMPLOYMENT INSURANCE SERVICE, U.S. DEPARTMENT OF LABOR, DRAFT LEGISLATION TO IMPLEMENT THE EMPLOYMENT SECURITY AMENDMENTS OF 1970 . . . H.R. 14750--TOGETHER WITH EXPLANATORY COMMENTARY 31 13

OPINIONS BELOW

The opinion of the Hawaii Supreme Court entered February 16, 1982, the opinion of the First Circuit Court, State of Hawaii, and decision of the Department of Labor and Industrial Relations Appeals Referees' office are set out in the Appendix A hereto. The decision of the Hawaii Supreme Court is not yet reported in a bound volume.

JURISDICTION

This action challenges the Hawaii Supreme Court's decision to affirm a determination made by the Unemployment Insurance Division of the Hawaii State Department of Labor and Industrial Relations (hereafter "U.I. Division") to expand the reach of Hawaii's Employment Security Law to a foreign corporation doing business solely on the island of

Guam on the ground that the application of the Hawaii employment tax would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. Hawaii's interpretation would impose a serious burden on interstate commerce and drastically upset settled constitutional balances by extending Hawaii's employment tax on a foreign corporation's (i.e. Black) employment in Guam of employees who were neither recruited nor hired in Hawaii and who perform no employment services in the taxing state solely because Black's parent corporation is doing business in Hawaii and some of Black's officers who are not involved in Black's daily business operations reside in Hawaii due to their position as officers of the parent corporation and in spite of a long and consistent line of federal court decisions holding that the

mere residence of a parent corporation or the mere residence of a corporate officer does not constitute "doing business" in the state.

The federal constitutional question was timely raised by the Appellant following the State's determination of coverage and on appeal to the First Circuit Court, State of Hawaii. On February 7, 1979, the Circuit Court summarily determined that the imposition of the employment tax by the State of Hawaii was constitutional under the due process clause of the Fourteenth Amendment to the U.S. Constitution. On January 22, 1982, the Supreme Court of the State of Hawaii affirmed the lower court and unanimously held that the presence of Black's parent corporation in Hawaii and the residence in Hawaii of some of Black's officers even though their residence was due to their position

as officers of Black's parent corporation constituted sufficient contacts to subject a Nevada corporation to Hawaii's employment tax. Judgment was entered on February 16, 1982.

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Hawaii on appeal is conferred by 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States, Hawaii Revised Statutes §383-2(c), and I.R.C. §3306(c) and (j) are set out in full in Appendix B hereto.

STATEMENT OF THE CASE

Amado Rosales (hereafter "Rosales") and Roger Widdifield (hereafter "Widdifield"), two former

employees of Black on Guam, applied for unemployment benefits in Hawaii. On November 26, 1975, the U.I. Division sent a letter to Black stating that Rosales and Widdifield had been engaged in employment covered by the Hawaii Employment Security Law and assessed $328.88 in Hawaii employment taxes on wages paid to Rosales and Widdifield in 1975. Although only these two former employees of Black had filed claims for unemployment benefits in Hawaii, the State went on to state that this was a "class determination" covering "all other U.S. citizens - employees performing services for Black Construction in Guam."

Black appealed the action of the U.I. Division and, after a hearing before a referee, a decision affirming the determination was rendered on May 26, 1978. Both the U.I. Division and the Referee based their findings and

conclusions that employment services performed for Black on Guam constituted "employment" taxable by Hawaii solely on the language of Haw. Rev. Stat. §383-2(c)(1) which extends the reach of Hawaii's Employment Security Law to, inter alia, any United States corporation whose principal place of business in the United States is located in Hawaii. The determinations of the U.I. Division and the Referee that Black was in fact doing any business within the State of Hawaii was based on the presence in Hawaii of Black's parent corporation and the residence in Hawaii of some of Black's corporate officers notwithstanding the fact that such officers do not participate in the daily operation of Black's business and reside in Hawaii solely because of the duties they perform as officers of Black's parent corporation.

Black timely appealed to the First Circuit Court, State of Hawaii, from the Decision of the Referee. On February 7, 1979, the Circuit Court affirmed and modified the Referee's Decision by adding an additional ground, Haw. Rev. Stat. §383-2(c)(3), for asserting jurisdiction over the Appellant even though the Hawaii statute expressly provided that §§383-2(c)(1) and (3) were mutually exclusive. The Circuit Court also summarily found the imposition of the tax by Hawaii on the services performed in Guam to be constitutional under the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, §4 of the Hawaii Constitution.

Black timely appealed t .he Supreme Court of the State of Hawaii. On January 22, 1982, the Hawaii Supreme Court affirmed the judgment of the

Circuit Court. The Supreme Court agreed with the Circuit Court, referee and the U.I. Division that Black's "principal place of business in the United States is located in this State." The Supreme Court disagreed with Black's contention that the "employment tax enacted for the privilege of hiring employees is fundamentally unfair as Black neither recruits, hires nor has work performed by employees in Hawaii" and concluded that the presence in Hawaii of Black's parent corporation, E.E. Black Inc., and some of its corporate officers were sufficient contacts, ties or relations to make it reasonable and just for Hawaii to levy its tax on Black.

THE FEDERAL QUESTION IS SUBSTANTIAL

This Court has not yet had the occasion to decide under what circumstances, if any, a state may

constitutionally, under the due process clause of the Fourteenth Amendment to the United States Constitution, impose its employment tax on a foreign corporation's employment outside the taxing state of employees who perform no services in the taxing state. The decision of the Supreme Court of Hawaii permits Hawaii to levy an employment tax upon Black despite the established facts that Black is incorporated in the State of Nevada; carries on no construction operations in Hawaii; owns no property and maintains no office or records in Hawaii; and does not have any employees pursuing its construction business in Hawaii.

Upon examination and interpretation of the decisions of this Court and the various lower federal courts regarding the imposition of taxes, it is clear that the imposition of the employment tax on Black by Hawaii does

not comport with the due process clause of the Fourteenth Amendment to the United States Constitution.

In only one case, International Shoe Company v. Washington, 326 U.S. 310 (1945), has this Court passed upon the constitutionality under the due process clause of a state tax on the employment of employees by a foreign corporation. In that case, the State of Washington sought to impose its employment tax on the employment by International Shoe Company, a Delaware corporation, with its principal place of business in St. Louis of salesmen present in Washington to solicit mail orders. After reaching its landmark determination that International Shoe Company had "sufficient contact or ties" with Washington "to make it reasonable and just, according to our traditional conception of fair play and substantial justice" for the Company to

be sued for the employment tax in Washington courts, 326 U.S. at 320, this Court went on to uphold the constitutionality of the tax itself, 326 U.S. at 321-22.

The decision in International Shoe suggests that a close relationship exists between the due process standards for in personam jurisdiction and the standards governing a state's jurisdiction to impose employment taxes on foreign corporations. "The activities which establish . . . (International Shoe's) 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 310. Moreover, the Court's conclusions concerning the activities of International Shoe in Washington suggest that state employment taxes on foreign corporations must satisfy the same due process tests that this Court has

established for the imposition of other state taxes on foreign corporations: (1) whether there are sufficient contacts by the corporation with the taxing state for it to be assumed that the corporaton has benefited from the state's services and (2) whether there is a sufficient relationship between the corporate activities that the state seeks to tax and the corporation's activities in the taxing state.

The Supreme Court of Hawaii concluded that Black's principal place of business in the United States is located in Hawaii because of the presence in Hawaii of Black's parent corporation and some of Black's officers and therefore it was reasonable and just for Hawaii to levy its employment tax on Black because Black has more significant contacts, ties, or relations with Hawaii than with any other American Jurisdiction. In so

ruling the Supreme Court of Hawaii ignored the express admonition of the U.S. Department of Labor in its official commentary to the model law adopted by Hawaii that there would be some American employers who had no place of business within the United States.[1/]

This Court stated in Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444 (1940):

> A state is free to pursue its own fiscal policies, unembarrassed

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1/ The commentary reads as follows:

> The Employers of the great majority of U.S. citizens working for American employers outside the United States have a place of business in the United States. In some cases, however, an American employer may be physically located entirely outside the United States and have no place of business in the United States. (emphasis added).

Unemployment Insurance Service, U.S. Department of Labor, Draft Legislation to Implement the Employment Security Amendments of 1970 . . . H.R. 14750 -- Together with Explanatory Commentary 34.

> by the Constitution, if the state has exerted its power in relation to opportunities it has given to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society.

Further, to assure that a state tax is justified by such reciprocal state benefits this Court's decisions with respect to taxation "reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-45 (1956).

Black Construction does not receive any advantage or service from the State of Hawaii in return for the employment tax Hawaii seeks to impose upon it. Black does not receive any

benefit from the tax's maintenance in Hawaii of a pool of trained workers; it receives no state administrative services; it owns no property nor does it maintain any office or records in Hawaii that would benefit from Hawaii's judicial, police, fire or other societal services; and it does not have any employees pursuing its construction business in Hawaii. While it is true as found by Hawaii's Supreme Court that Black Construction is the wholly owned subsidiary of E.E. Black Ltd., a Hawaii corporation, which has its principal place of business in Hawaii; that four of Black's eight officers are also officers of E.E. Black Ltd. and that three of Black's officers who live on Guam are paid through E.E. Black, Ltd. so that they can receive "stateside-type" fringe benefits (with reimbursement from Black Construction), all decisions as to the

day-to-day operations of Black are made on Guam by officers who live on Guam and these Guam-based officers submit all of the Company's contract bids for construction work, which is performed by Black Construction's employees on Guam only. Our federal courts have long and consistently held that the presence of a parent corporation or the residence of some corporate officers in the taxing state does not mean that a separately incorporated subsidiary corporation is doing business in the taxing state so as to satisfy constitutional due process requirements. Blount v. Peerless Chemicals (P.R.) Inc., 316 F.2d 695 (2d Cir., 1963), cert. denied sub nom Colbert v. Peerless Chemicals (P.R.) Inc., 375 U.S. 831 (1963); A.G. Bliss Co. v. United Carr Fastner Co., 213 F.2d 541 (1st Cir., 1954).

The absence of appreciable links, connection or contacts with the State of Hawaii establishes that Black did not benefit from any of Hawaii's services and thus mandates a finding that Hawaii cannot constitutionally impose its employment tax on Black.

Further, due process requires not only minimum beneficial contacts but also a relationship between the corporate activities that a state seeks to tax and the corporation's activities in the taxing state. "(A) state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies the state power to tax or regulate the corporation's property and activities elsewhere." Construction General Life Insurance Co. v. Johnson, 303 U.S. 77, 80-81 (1938). This Court in American Oil

Company v. Neill, 380 U.S. 451 (1965) held that the due process clause precluded the State of Idaho from requiring a foreign corporation to pay a tax on its sale of fuel in Utah, even though the corporation was a licensed Idaho dealer and knew that the fuel was to be used in Idaho.

> The Corporation can . . . exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be "dissociated from the local business," Norton Co. v. Department of Revenue, supra, 370 U.S. at 537, and therefore may not, consistent with due process, be taxed.

Id. at 458.

This Court has characterized the federal employment tax as an "excise on the relations of employment." Steward Machine Co. v. Davis, 301 U.S. 548, 578

(1937), and has characterized state taxes to fund unemployment compensation funds as taxes on the right to employ labor. International Shoe Co. v. Washington, 326 U.S. 310, 321 (1945); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 508 (1937).

The activity Hawaii seeks to tax through its Employment Security Law is the right to employ labor in Hawaii. However Black clearly does not recruit, hire or employ any labor in Hawaii. The construction employees who are actually performing Black Construction's business activities are hired on Guam; they reside on Guam; they perform their services on Guam; and their personnel matters are handled by Black's personnel office on Guam. Black Construction does not own any property in Hawaii and does not derive any revenue from any business activity with persons who reside in the

taxing state. Black is a Nevada construction corporation that performs its construction work solely on the Island of Guam. It does not seek or accept contracts to perform construction work in Hawaii. Thus there is clearly no relationship between Black's employment activities on Guam and Hawaii's employment tax.

Further, Black, a Nevada corporation, is subject to Nevada law and has complied with the unemployment insurance laws of the State of Nevada since 1975. Thus, even if this Court were to reverse the Hawaii Supreme Court's decision, no U.S. citizen employed by Black will be denied benefits.

In summary, the opinion of the Hawaii Supreme Court permits the unconstitutional imposition by Hawaii of an employment tax on a Nevada corporation performing construction work exclusively

on Guam. As Justice Frankfurter succinctly stated:

> Of course, the Due Process Clause has its application to the taxing powers of the States - a State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no "jurisdiction" to tax.

Tax Commission v. Aldrich, 316 U.S. 181, 183 (1942) (concurring opinion).

CONCLUSION

The decision by the Hawaii Supreme Court permitting the imposition of its employment tax on a Nevada corporation doing business solely on the island of Guam raises a substantial federal constitutional question.

Accordingly, this appeal should be accorded plenary review.

DATED: Honolulu, Hawaii, May 10, 1982.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

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BLACK CONSTRUCTION CORPORATION, Appellant, v. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

FILED
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NO. 7345

APPEAL FROM THE FIRST CIRCUIT COURT

HONORABLE YASUTAKA FUKUSHIMA, JUDGE

CIVIL NO. 54850

JANUARY 22, 1982

RICHARDSON, C.J., LUM, NAKAMURA, JJ., RETIRED JUSTICES OGATA AND MENOR ASSIGNED BY REASON OF VACANCIES

STATUTES - construction and operation - general rules of construction - intention of legislature - in general.

The primary duty of courts in interpreting and applying statutes is to ascertain the intention of the legislature and to implement that intention to the fullest degree.

SAME - same - same - extrinsic aids to construction - in general.

SAME - same - particular classes of statutes - liberal or strict construction as affected by nature of act in general - revenue laws.

The rule of strict construction with regard to taxing statutes should only be resorted to as an aid to construction when an ambiguity or doubt is apparent on

the face of the statute, and then only after other possible extrinsic aids of construction available to resolve the ambiguity have been exhausted.

SAME - same - general rules of construction - extrinsic aids to construction - in general.

When aid to construction of the meaning of words as used in a statute is available, there is no rule of law which forbids the use of such aid, even though the words may appear clear on superficial examination.

SOCIAL SECURITY - unemployment compensation - in general - construction and operation of statutes.

SAME - same - employment, employees, and employers covered in general - in general.

Under the statutory scheme governing the federal-state system of unemployment insurance, an overseas employer's American base of operations is a "place of business," and the employer is covered by the unemployment insurance law of the state where its American headquarters are located.

SAME - same - in general - in general; purpose.

The assessment of unemployment insurance taxes against an overseas employer bears little or no relation to employment in Hawaii; it is related to employment in foreign commerce.

SAME - same - same - same.

COMMERCE - power to regulate in general - powers remaining in states, and limitations thereon - in general.

In adopting the Social Security Act, Congress declared an intent to allow the states to regulate interstate and foreign commerce in specified ways.

SOCIAL SECURITY - unemployment compensation - in general - constitutional and statutory provisions.

SAME - Funds; payments; amount and period; recovery back - Funds and payments; assignments.

In enacting the Employment Security Amendments of 1970, Congress specifically authorized the State to impose a tax on overseas employers who have ties with the State, but on condition that moneys realized would be channeled into a federal trust fund for purposes related to the federal-state unemployment insurance program.

TAXATION - constitutional requirements and restrictions - constitutional provisions in general.

SAME - nature and extent of power in general - power of state - in general.

As the Due Process Clause does not contemplate that a state may impose a tax on a corporation with which it has no contacts, ties, or relations, the corporation's activities which are related to a claimed obligation must establish that it has sufficient contacts or ties with the state to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligation.

SAME - same - same - same.

It is reasonable and just for the State to enforce an obligation for unemployment insurance taxes based on overseas employment against a foreign corporation which has more significant contacts, ties, or relations with the State than with any other American jurisdiction.

OPINION OF THE COURT BY NAKAMURA, J.

The question is whether a building contractor organized as a corporation under the laws of Nevada and engaged in construction activity on Guam is subject to the Hawaii Employment Security Law by virtue of HRS § 383-2(c). 1/

1/ HRS § 383-2(c), in relevant part, reads:

> (c) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands as provided in paragraph (5) of this subsection), after December 31, 1971 in the employ of an American employer or of this State or of any of its instrumentalities or of any of its political subdivisions (other than service which is deemed employment under the provisions of section 383-3 or the parallel provisions of another state's law) if:
>
> (1) The employer's principal place of business in the United States is located in this State; or
>
> (2) The employer has no place of business in the United States, but
>
> (A) The employer is an individual who is a resident of this State; or
>
> (B) The employer is a corporation which is organized under the laws of this State; or
>
> (C) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other state; or
>
> (3) None of the criteria of paragraphs (1) and (2) of this subsection is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service under the law of this State.
>
> (4) An "American employer", for purposes of this subsection, means a person who is:
>
> (A) An individual who is a resident of the United States; or
>
> (B) A partnership if two-thirds or more of the partners are residents of the United States; or
>
> (C) A trust, if all of the trustees are residents of the United States; or
>
> (D) A corporation organized under the laws of the United States or of any state.

Black Construction Corporation, a wholly owned subsidiary of a Hawaii corporation, E.E. Black, Ltd., challenges a coverage determination made by the Unemployment Insurance Division of the Hawaii State Department of Labor and Industrial Relations (hereafter the Division), raising constitutional as well as statutory objections. But we agree with the decisions reached by the Division, the Referee for Unemployment Compensation Appeals, and the Circuit Court of the First Circuit that Black Construction Corporation (hereafter Black) is an employer responsible for contributions to the Unemployment Compensation Fund (hereafter the fund) maintained pursuant to HRS Chapter 383 and federal law.

I.

In early 1975, Amado Rosales and Roger Widdifield filed claims for unemployment insurance benefits payable under HRS Chapter 383, the Hawaii Employment Security Law; the claims were premised upon past employment with Black on Guam. The Division determined the claimants were entitled to benefits as they met all conditions for benefit eligibility, including prior employment by a covered employer. Their employment on Guam, as well as that "of all the U. S. citizen-employees of Black Construction Corporation," was deemed "employment" within the meaning of HRS § 383-2(c) since it was service performed by American citizens for an American employer whose principal place of business in the United States was in Hawaii. And as there was no record of contributions to the fund by Black, a "Notice of Contributions Due" was also transmitted to the employer. The assessment was contested, and a full hearing on the coverage question was conducted by the Referee for Unemployment Compensation Appeals.

The Referee noted Black's organization as a corporation under the laws of Nevada but found Black neither maintained an office nor engaged in any construction activity there. He further found Black's activities were centered on Guam, it was not licensed to act as a building contractor in Hawaii, and it engaged in no construction in Hawaii. That Black filed its yearly corporate reports with the State of Nevada and not with Hawaii was recognized by the Referee. He nonetheless concluded Black was an employer subject to the Hawaii law and not Nevada's for unemployment insurance purposes.

The record made before the Referee indicates Black is part of a Hawaii-based enterprise which extends over the reaches of the Pacific Ocean from the State of Washington to Indonesia. While E.E. Black, Ltd., the parent corporation (hereafter E.E. Black), engages in construction under its own name in Hawaii, it has elected to carry on operations in Washington, Guam, the Trust Territory, the Philippines, and Indonesia through separately incorporated, wholly owned subsidiaries. But the policy direction for this far-flung business venture consisting of ostensibly separate corporations is furnished by the parent in Honolulu. 2/

2/ The pertinent testimony of Robert Chapman, a Black vice-president and also an officer of E.E. Black, reads in part:

> Well, it doesn't only apply to Black Construction, it applies to other subsidiaries of E. E. Black where the corporation at the parent level where we establish certain policies, financial policies, reporting policies, engineering-type of policies and procedures, type of work to be bid on where it's into the private sector or whether to stay away from the private sector because it's looking weak, government sector, things of this nature and following the economy and things to do with how to protect ourselves in escalations and contracts. Recently, we set a policy for the corporation that stated that on all future bids we would put in the bid documents that it was subject to our being satisfied that the owner had financing, sufficient financing, proof of satisfaction to the contractor that the financing was there to complete the project.

The record manifests that four of Black's eight corporate officers are also officers of the parent corporation and the other subsidiary corporations. And these four officers who maintain offices and residences in Hawaii are responsible for setting policies and goals effective throughout the enterprise. While Black's day-to-day operations are controlled by its officers on Guam, the "guidelines" for the conduct of business there are established in Honolulu. E.E. Black also performs services from time to time for Black. 3/ There is other evidence of frequent contact and a close relationship between parent and subsidiary. For example, three of Black's officers who live on Guam are on the E.E. Black payroll.

Evidence of Black's compliance with Nevada's Unemployment Insurance Law was also adduced before the Referee. The contention that Black and its American-citizen employees were covered for unemployment insurance purposes by the Nevada law, however, was overruled on the ground that the compliance was effected some ten months after Black was apprised of the applications for benefits by its former employees under Hawaii law. The Referee found Black's "principal place of business in the United States . . . [was] located in Hawaii" and concluded the Division's assessment of contributions against the employer was proper under HRS § 383-2(c)(1). An appeal from the administrative decision to the circuit court followed.

3/ Mr. Chapman's testimony in this regard reads in part:

> We do assist at times if they're overloaded among these areas [daily operational requirements] and need some engineering work. They need some shop drawings, things of that nature they can't get out in time; then they'll ask for our assistance or vice-versa. We might ask for theirs, but, whoever works at whoever's else's work is charged back for it.

The circuit court reviewed the record made before the Referee and affirmed his decision that the employer was subject to the Hawaii law. The court, however, concluded the employment of American citizens by Black on Guam constituted "employment" within the meaning of the Hawaii Employment Security Law under HRS § 383-2(c)(1) and HRS § 383-2(c)(3).

II.

Black initially asserts it is not engaged in business in the United States. But if it can be deemed to be so engaged, it claims the principal place of the corporation's business in the United States is Nevada. Furthermore, the imposition of "an employment tax on a foreign corporation's employment of employees who perform no services in the taxing state," in Black's view, contravenes due process. A review of the record and the applicable law, however, convinces us the assessment of contributions was proper under the Hawaii and the federal laws relating to unemployment insurance and consistent with pertinent due process principles.

A.

Our review commences with an overview of the unemployment insurance system. The passage of the Social Security Act in 1935 4/ "laid the foundation for a cooperative endeavor between the states and the nation" to meet the problem of unemployment, for the portions of the Act relevant here represented "an attempt to find a method by which the states and the federal government could 'work together to a common end.'" Buckstaff Bath House Co. v.

4/ Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.).

McKinley, 308 U.S. 358, 363 (1939) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 588 (1937)). Although it recognized the "problem had become national in area and dimensions," Steward Machine Co. v. Davis, supra, at 586, Congress adopted a remedial expedient that actuated state action by imposing a federal payroll tax [5] on private employers but permitting tax credits of up to ninety per cent of the federal tax for their contributions to federally approved state unemployment compensation funds. [6] "That . . . [the Act] was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief." Buckstaff Bath House Co. v. McKinley, supra, at 363. "The federal Act . . . [was] obviously an invitation to the states to enter the field," Standard Dredging Corp. v. Murphy, 319 U.S. 306, 310 (1943), and "a coordinated and integrated dual system" of unemployment insurance was established. Buckstaff Bath House Co. v. McKinley, supra, at 364.

The first major changes in this unified scheme were embodied in the Employment Security Amendments of 1970. [7] While the most consequential amendment probably

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5/ The relevant provisions are now codified in the Internal Revenue Code as the Federal Unemployment Tax Act (26 U.S.C. §§ 3301-3311).

6/ See 26 U.S.C. § 3302 (1970).

7/ Pub. L. No. 91-373, 84 Stat. 695 (1970).

The Senate report accompanying the measure summarized its purposes as follows:

> The bill would extend the coverage of the unemployment compensation program to additional jobs, establish a permanent

was one that established a permanent federal benefit plan designed to operate in conjunction with the regular state programs to provide additional unemployment benefits for persons who exhaust their state benefits during periods of high unemployment, the changes effecting substantial extensions in the coverage of the federal-state program were also significant. The pertinent coverage extension was effected by amending the definition of "employment" as the term appears in the Federal Unemployment Tax Act [8] to include:

> any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation or in the Virgin Islands) by a citizen of the United States as an employee of an American employer. [9]

An "American employer" was defined to include "a corporation organized under the laws of the United States or of any State." [10]

The obvious congressional design was to afford unemployment insurance coverage for "construction personnel employed overseas by American contractors engaged in over-

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7/ (Continued).

> program of extended benefits for people who exhaust their regular State benefits during periods of high unemployment, provide the States with a procedure for obtaining judicial review of certain adverse determinations by the Secretary of Labor, improve the financing of the program, provide certain limited requirements for State unemployment compensation programs which are designed to protect the integrity of the program, and make other changes to strengthen the Federal-State unemployment compensation system.
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> S. Rep. No. 91-752, 91st Cong., 2d Sess. ____, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 3606, 3607.

8/ If a person performs services constituting "employment" as defined, both he and his employer are covered by the Act.

9/ Now codified in 26 U.S.C. § 3306(c).

10/ Now codified in 26 U.S.C. § 3306(j)(3).

seas construction work" by stimulating state action to provide the protection. [11] That Congress expected prompt and favorable responses to the stimulus is also a matter of record. [12] And the "invitation" was subsequently reiterated by the agency charged with the administration of the federal aspects of the integrated program, the Unemployment Insurance Service of the United States Department of Labor, through specific proposals submitted to the states for possible legislative action.

11/ The Senate report referred to earlier stated in part:

> In recent years, the number of U.S. citizens working for American employers abroad has greatly increased, due primarily to the large number of construction personnel employed overseas by American contractors engaged in overseas construction work for the armed services. While the total number of individuals involved--approximately 160,000--is a very small proportion of the total work force, it is a substantial number. When these individuals, after completing their work overseas, seek work in the United States, they are not eligible to receive unemployment benefits. Some States have become increasingly concerned over the problem. A State, however, may be reluctant to cover overseas contractors based in that State, because by doing so it may place the contractors operating out of that State at a competitive disadvantage in relation to contractors operating out of States which do not cover employment outside the United States.
>
> The Federal unemployment tax has in the past been an effective device for removing interstate competition as an impediment to coverage by State laws. Because the credits against the Federal tax results in a combined net Federal and State tax lower, in most cases, than the full Federal tax, States have been prompt to extend State coverage to employment subject to the Federal tax and employers have been quick to seek State law coverage when they become subject to the Federal tax.

S. Rep. No. 91-752, 91st Cong., 2d Sess. ____, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 3606, 3621.

12/ S. Rep. No. 91-752 also stated in pertinent part:

> The bill would apply the Federal tax to the wages earned by individuals in overseas employment for American employers without specifying coverage in any State. It is anticipated that States will act to cover this type of employment, as they have in the past when other employers became subject to the Federal tax without being subject to the basic coverage provisions of any State law.

14.

Hawaii's response was prompt and predictable; HRS Chapter 383 was extensively amended in 1971 to accommodate changes in the federal law made by the Employment Security Amendments of 1970, [13] and the amendatory language followed these amendments and the suggestions for implementation prepared by the federal agency. [14] In text, HRS § 383-2(c) thus represents a nearly verbatim replication of those provisions of the federal Draft Legislation tailored to effect state unemployment insurance coverage of the overseas employment of American citizens by American employers. [15]

B.

Black concedes it is an American employer for whom services have been performed outside the United States by American citizens and that it therefore is subject to the federal payroll tax imposed by 26 U.S.C. § 3301 (the Federal Unemployment Tax). But it contests coverage under HRS Chapter 383, claiming (1) the Hawaii Employment Security Law can not apply to a corporation incorporated under the laws of Nevada that does no business in the United States and (2) whatever may be due by way of state unemployment insurance contributions is owed to Nevada under provisions of the

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13/ See S.L.H. 1971, c. 187, and Sen. Stand. Comm. Rep. No. 429, in 1971 Senate Journal 977. The committee report stated the purpose of the bill which became Act 187 as follows:

> The purpose of this bill is to amend the Hawaii Employment Security Law in several respects to make it conform to new federal standards for state unemployment compensation laws enacted in P. L. 91-373, popularly known as the "Employment Security Amendments of 1970."

Id. at 977-78.

14/ See UNEMPLOYMENT INSURANCE SERVICE, U.S. DEPARTMENT OF LABOR, DRAFT LEGISLATION TO IMPLEMENT THE EMPLOYMENT SECURITY AMENDMENTS OF 1970 . . . H.R. 14705 — TOGETHER WITH EXPLANATORY COMMENTARY (hereafter Draft Legislation).

15/ Id. at 9-10.

Nevada Unemployment Compensation Law paralleling HRS § 383-2(c)(2). 16/

Quoting familiar canons of statutory construction, it argues the relevant term, "place of business," cannot include Hawaii where Black and its business are concerned. That the headquarters of the enterprise of which it is a part are situated in Honolulu and that activity related to the business in Guam transpires there do not, in its opinion, render Hawaii a place where Black is engaged in business. For statutes imposing taxes, it contends, should be "strictly construed in favor of the taxpayer" and the words used therein "should be taken in their popular sense." Any reading other than a narrow one favoring the taxpayer, it also infers, "would create a substantial doubt as to the statute's constitutional validity." But we do not consider the foregoing canons controlling; nor do we believe Hawaii's assessment of unemployment insurance contributions against Black would engender "serious constitutional problems."

"[O]ur primary duty [in interpreting and applying statutes] is to ascertain the intention of the legislature and to implement that intention to the fullest degree." Keller v. Thompson, 56 Haw. 183, 189, 532 P.2d 664, 669 (1975). "[T]he rule of strict construction with regard to

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16/ HRS § 383-2(c)(2) reads in pertinent part:

> (c) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States . . . in the employ of an American employer . . . if:
>
> . . . .
>
> (2) The employer has no place of business in the United States, but
>
> . . . .
>
> (B) The employer is a corporation which is organized under the laws of this State.

taxing statutes should only be resorted to 'as an aid to construction when an ambigui' · or doubt i 'pparent on the face of the statute, and then only after other possible extrinsic aids of construction available to resolve the ambiguity have been exhausted.' Bishop Trust Company v. Burns, 46 Haw. 375, 399-400, 381 P.2d 687, 701 (1963)." In re Hawaiian Telephone Co., 61 Haw. 572, 578-79, 608 P.2d 383, 388 (1980).

Black, however, discerns no ambiguity in the statute, asserts the words should be read in their "popular sense," and claims Guam is the only place where it conducts business. But "place of business" and "doing business" have lent themselves to many meanings as even a cursory review of relevant case law reveals. See 32A Words and Phrases 140-153 and In re Heftel Broadcasting Honolulu, 57 Haw. 175, 180 n.4, 554 P.2d 242, 246 n.4 (1976), cert. denied, 429 U.S. 1073 (1977). 17/ Moreover, "[w]hen aid to construction of the meaning of words, as used in the statute is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940) (footnotes omitted); Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976). And when there is a plethora of material evidencing legislative purpose and intent, there is no reason for a court to seek refuge in "strict construction," "plain meaning," or "the popular sense of the words."

1.

HRS § 383-2(c), as we have seen, was enacted in 1971 to bring overseas employment of American citizens by

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17/ There, we said "that significantly more business activity is required for qualification purposes than for taxing jurisdiction."

American contractors within the ambit of the Hawaii Employment Security Law. It was passed to implement a decision by Congress to cover service performed outside the United States under the unitary system of unemployment insurance which was established by the Social Security Act. 18/ The implementing language of Act 187, S.L.H. 1971, is also of federal derivation. See notes 14 and 15 supra. The expressions of purpose and intent in source material consisting of legislative reports and documents prepared by the agency charged with oversight of the federal aspects of the integrated system tell us that "place of business" necessarily has a broader connotation than the situs of a building contractor's activity abroad or the state under whose laws it may be organized as a legal entity.

In adopting the Employment Security Amendments of 1970, Congress assumed that an American employer engaged in business abroad ordinarily has an American base from which it operates. 19/ Relevant provisions of the Draft Legislation described this "base" in terms of "the employer's principal place of business in the United States." See Draft Legislation, at 9. The commentary thereon delineated

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18/ That the interests furthered by the State legislative action are federal as well as local is obvious. Furthermore, the taxes collected from employers as a result of the expanded coverage of the Hawaii law are not part of the State's general revenues. The moneys collected are placed in a special fund and subsequently deposited in the federal unemployment trust fund established and maintained pursuant to § 904 of the Social Security Act, as amended. See HRS §§ 383-121 and 383-122. Benefit payments are made from the trust fund when claims for unemployment insurance benefits are made by eligible claimants who may or may not be residents of Hawaii.

19/ See, e.g., note 11 supra, where a relevant portion of S. Rep. No. 91-752, 91st Cong., 2d Sess., is reproduced. A clear design to induce a state to expand the coverage of its law "to cover overseas contractors based in that State" is reflected there.

the primary considerations in determining "principal place of business" as follows:

> The basic test applied is whether the employer's principal place of business in the United States is located in the State. If it is, the service is covered in that State. Principal place of business in the United States refers to the employer's headquarters in the United States, the business address where its highest officers in the United States are located. The employers of the great majority of U.S. citizens working for American employers outside the United States have a place of business in the United States. In some cases, however, an American employer may be physically located entirely outside the United States and have no place of business in the United States.

Draft Legislation, at 33-34. Hence, the governing federal-state scheme regards an overseas employer's American base as a "place of business"; it also contemplates that the employer will be brought into the integrated system under the laws of the state where its American headquarters are located.

The State Unemployment Insurance Division, the Referee for Unemployment Compensation Appeals, and the circuit court agreed Black was subject to the Hawaii Employment Security Law pursuant to HRS § 383-2(c)(1), [20/] inasmuch as its highest officers are in Hawaii. We likewise encounter no difficulty in concluding Black has an American base and

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20/ . HRS § 383-2(c)(1) reads in pertinent part:

> (c) The term "employment" shall include the service of an individual who is a citizen of the United States . . . in the employ of an American employer . . . if:
>
> (1) The employer's principal place of business in the United States is located in this State.

The circuit court also found Black was subject to the law by reason of HRS § 383-2(c)(3). We agree with the employer that this subsection is inapplicable because Black has a place of business in the United States. But "we have repeatedly held that where the . . . [lower] court has reached a correct conclusion, its decision will not be disturbed on the ground that the reasons it gave for its action were erroneous." Hawaii Carpenters' Trust Funds v. Aloe Dev. Corp., 63 Haw. 566, 578, 633 P.2d 1106, 1113 (1981); Federal Elec. Corp. v. Fasi, 56 Haw. 57, 64, 527 P.2d 1284, 1289-90 (1974); accord, Okuna v. Nakahuna, 60 Haw. 650, 656, 594 P.2d 128, 132 (1979); Cain v. Cain, 59 Haw. 32, 36, 575 P.2d 468, 472 (1978); Waianae Model Neighborhood Area Ass'n v. City & County, 55 Haw. 40, 43, 514 P.2d 861, 864 (1973).

its "principal place of business in the United States is located in this State." For "the employer's headquarters in the United States," from which its highest officers direct the corporation, are here.

- 2.

But Black contends the State's assessment of unemployment insurance contributions on service rendered abroad for a Nevada corporation contravenes due process. Viewing the contributions as an "employment tax" exacted for the privilege of hiring employees, it maintains the levy is fundamentally unfair as Black neither recruits, hires, nor has work performed by employees in Hawaii. 21/ Given the nature of our system of unemployment insurance and the purpose and intent of HRS § 383-2(c), we can only conclude that the contentions lack merit.

Black professes to find primary support for its proposition in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and In re Heftel Broadcasting Honolulu, supra. In International Shoe, the Supreme Court upheld the State of Washington's imposition of an "employment tax" on a foreign corporate employer on the basis of substantial services rendered the employer by employees within the state. And in Heftel, we said jurisdiction to impose a privilege tax, the general excise, hinged upon a reasonable fiscal relationship between the tax and the protection, opportunities, and benefits afforded the taxpayer by the State. 57 Haw. at 182, 554 P.2d at 247. Since no construction worker performs service for Black in Hawaii and a tax-benefit nexus is not apparent, it argues the exaction of an

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21/ Although it neither recruits, hires, nor has work performed by employees in Nevada, Black apparently does not consider a similar levy by Nevada fundamentally unfair.

"employment tax" in this case must perforce be invalid. We have no doubt that the cases proclaim sound principles of due process. Yet within the relevant statutory context, International Shoe lends no support to Black's cause and Heftel cannot be assigned controlling precedential weight.

The assessment against Black bears little or no relation to employment in Hawaii; it is related instead to employment in foreign commerce. What would otherwise be an unsupportable invasion of a congressional preserve, however, has been sanctioned by prior design. For Congress, in adopting the governing statutory scheme envisioned that the State would regulate interstate and foreign commerce "in specified ways." International Shoe Co. v. Washington, supra, 326 U.S. at 315. 22/ Consistently therewith, the Employment Security Amendments of 1970 specifically authorized, indeed encouraged, the imposition of a burden on overseas employers who maintain contacts with Hawaii. The authorization, however, was subject to a condition that the moneys realized would be channeled into a federal trust fund

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22/ The Court's statement in this regard reads as follows:

> Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U.S.C. § 1606(a) provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334; Perkins v. Pennsylvania, 314 U.S. 586; Standard Dredging Corp. v. Murphy, 319 U.S. 306, 308; Hooven & Allison Co. v. Evatt, 324 U.S. 652, 679; Southern Pacific Co. v. Arizona, 325 U.S. 761, 769.

326 U.S. at 315.

53 Stat. 1391, 26 U.S.C. § 1606(a), is presently codified as 26 U.S.C. § 3305(a).

for purposes related to the federal-state unemployment insurance program. See note 18 supra and HRS §§ 383-121 through 383-125. The nature of the assessment thus renders an application of the Heftel test to determine state taxing jurisdiction inapposite.

But the subjection of Black to liability for contributions still turns on an establishment of its "presence" in Hawaii. The Due Process Clause does not contemplate that a state may impose a tax on a corporation with which it has "no contacts, ties, or relations." See International Shoe Co. v. Washington, supra, 326 U.S. at 318-21. The operations or activities of the corporation as they are related to a claimed obligation must establish that it has "sufficient contacts or ties with the state . . . to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce" the obligation. Id. at 320. Black concedes the orderly administration of the phase of the unemployment insurance system at issue requires the exaction of contributions from overseas employers by one of the states. Since Black's American ties are with Hawaii and Nevada, the precise question is whether it would be reasonable and just for Hawaii, rather than Nevada, to enforce the obligation.

Black's "presence" in Nevada is premised upon its organization under the laws of that state. 23/ The "presence," albeit a legal one, may be characterized as more

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23/ As Black claims to engage in no business in the United States, we have little doubt that its organizers selected Nevada as the place of incorporation for reasons not relevant here. But we have reason to believe Nevada was chosen for the same reason Delaware is so often a place of incorporation. It is no secret that "Nevada has attempted to become the western Delaware." Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 665 (1974).

fictional than factual. [24] By admission, the activities in Nevada are confined to the filing of statutorily mandated reports and the appointment of an agent through whom service of process upon the corporation may be effected. In contrast, Black's "presence" in Hawaii is a factual presence. Its parent and its highest ranking corporate fiduciaries are in Hawaii, corporate policies are determined here, and the parent performs services on its behalf here. Hawaii unquestionably serves as Black's American base of operations. It is reasonable and just for Hawaii to enforce the obligation in question, for Black has more significant contacts, ties, or relations with Hawaii than with any other American jurisdiction. [25]

Affirmed.

William A. Richardson

Edward H. Nakamura

Thomas S. Ogata

Benjamin Menor

Robert S. Katz (Carl M. Selinger with him on opening brief; Torkildson, Katz, Jossem & Loden, of counsel) for appellant

Dwight Nadamoto (Carol K. Yamamoto and Edward E. Case, Legal Intern, on the brief), Deputies Attorney General, for appellee Department of Labor & Industrial Relations, State of Hawaii

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24/ See International Shoe Co. v. Washington, supra, 326 U.S. at 316.

25/ Our decision also raises no problem of comity as Nevada has indicated a willingness to defer to Hawaii in this matter.

1ST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

BLACK CONSTRUCTION CORPORATION,	CIVIL NO. 54850
Appellant,	DECISION AND ORDER
vs.	
JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; and AMADO E. ROSALES; and ROGER WIDDIFIELD,	
Appellees.	

DECISION AND ORDER

The above-entitled case is an Appeal by BLACK CONSTRUCTION CORPORATION from Referee's Decision No. 1186-75A, Employment Security Appeals Referees Office, Department of Labor and Industrial Relations, State of Hawaii, dated May 26, 1976, affirming a determination by the Unemployment Insurance Division of the Department of Labor and Industrial Relations, dated November 26, 1975, that Claimant Amado E. Rosales and all of the U. S. citizen-employees of BLACK

I do hereby certify that this is a full, true and correct copy of the original on file in this office.

Clerk, Circuit Court, First Circuit
State of Hawaii

CONSTRUCTION CORPORATION on Guam were covered for unemployment insurance purposes under the provisions of the Hawaii Employment Security Law, Chapter 383, Hawaii Revised Statutes.

The issues before the Court were whether services performed by U. S. citizens on Guam for the BLACK CONSTRUCTION CORPORATION constituted "employment" taxable by Hawaii under §383-2(c), H.R.S.; and whether the imposition by Hawaii of said employment tax on services performed in Guam was unconstituional under the due process clauses of the 14th Amendment of the U. S. Constitution and Article I, §4 of the Hawaii Constitution.

This case having been submitted to the Court on the record and written briefs of the parties hereto, the parties having made oral argument to the Court, and the Court being duly apprised in the premises, and having duly considered all pleadings, finds that the Referee's decision is supported by the Record.

The Court further finds that the State of Hawaii has jurisdiction to tax the services performed by U. S. citizen-employees on Guam for the BLACK CONSTRUCTION CORPORATION not only under §383-2(c)(1), H.R.S., but also under §383-2(c)(3), H.R.S. With regard to §383-2(c)(1), H.R.S., the Court finds that BLACK CONSTRUCTION CORPORATION'S highest officers are located in the State of Hawaii, and that BLACK CONSTRUCTION CORPORATION'S principal place of business in the United States is located in the State of Hawaii.

Lastly, the Court finds that the imposition of said employment tax by the State of Hawaii on the services performed in Guam is constitutional under the due process clauses of the 14th Amendment of the U. S. Constitution and Article I, §4 of the Hawaii Constitution.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Referee for Employment Security Appeals, numbered 1186-75A and dated May 26, 1978, be modified as to its basis to include jurisdiction of the State of Hawaii under §383-2(c)(3), H.R.S., and be affirmed as to its result.

DATED: Honolulu, Hawaii, FEB - 7 1979

JUDGE OF THE ABOVE-ENTITLED COURT

SEAL

APPROVED AS TO FORM:

ROBERT S. KATZ
Attorney for Appellant BLACK CONSTRUCTION CORPORATION

MS-95.05

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
APPEALS REFEREES' OFFICE

In the Matter of the Claim of:

Amado E. Rosales, et al
1822-A Liliha Street
Honolulu, HI 96817

Claimant
SSA NO. 575-66-8621

Black Construction Corp.
c/o Robert S. Katz, Esq.
700 Bishop Street, Ste. 1512
Honolulu, HI 96813

Employer-Appellant

Referee's Decision: 1186-75A

Date Appeal Filed: December 12, 1975

Section of Hawaii Employment Security Law: 383-6

Time and Place of Hearing:
1:30 p.m., May 6, 1976
Honolulu, Hawaii

Parties Present:
Employer
Employer's Representatives
Counsel for Employer
Claimant
Department Representatives

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Black Construction Corporation, hereinafter referred to as employer, appealed from the letter of determination dated November 26, 1975, and notice of contribution assessment dated November 26, 1975, both issued by the Unemployment Insurance Division of the State of Hawaii.

Employer filed a letter of appeal on December 11, 1975, transmitting therewith its payment in the assessed sum of $328.88.

STATEMENT OF FACTS: The employer was incorporated in the state of Nevada in 1964, and is engaged in the business of general contracting of heavy construction. All construction operations are carried on in Guam. There are no offices or equipment in Nevada, nor does the company have any construction operations within that state. The company files yearly corporate reports in the state of Nevada. No corporate reports have ever been filed in the state of Hawaii, and the employer does not possess a license to carry on business in the state of Hawaii. Employer pays no excise tax in the state of Hawaii. The employer alleges that it maintains an address and telephone in the state of Nevada and has a Nevada attorney act as its designated agent within that state.

The company is a wholly owned subsidiary of a large Hawaii corporation. The company has eight corporate officers, several of whom are also officers of the parent company. Four officers of the company reside in the state of Hawaii.

During the hearing, the company submitted documentary evidence to establish that it has been contributing to the unemployment insurance fund in the state of Nevada for all of its United States citizen employees on Guam.

One of the witnesses appearing on behalf of the company stated that several of the key salaried employees of the company are paid through the parent company. This was reportedly to enable them to participate in certain fringe benefits programs. The company representative further maintained that all such payments were reimbursed by the parent company. Accounting and personnel functions are conducted on Guam. Tax returns, most of the financial statements, and payroll are prepared in the company office on Guam and are forwarded to Honolulu for review. The company representative testified that in the event that any of its corporate officers of the parent company in Honolulu perform services for the Guam company, any payments made for these services are charged back to the Guam subsidiary.

Policy decisions are made by the officers who reside in Hawaii. All decisions regarding the day-to-day regular activities of the employer are purportedly made on Guam by the officers who live and reside on Guam, and these Guamanian officers coordinate the major activities of the company. The policies which are established in Honolulu include financial policies, reporting policies, engineering policies and procedures, and contract policies. There are no scheduled meetings of the officers of the corporation. Meetings between the officers who reside in Honolulu and the officers located on Guam are held only if one of the officers from Honolulu has other business on Guam or if one of the officers from Guam is in Honolulu.

On February 10, 1975, claimant filed an initial claim for unemployment benefits in the state of Hawaii. The record indicates that claimant worked for the subsidiary company on Guam from September 19, 1972 to October 31, 1973, and from November 30, 1973 to January 2, 1975. Claimant is, and at all times relevant to this proceeding was, an American citizen. During the course of the hearing, a certificate of naturalization, #9270585, was introduced into evidence indicating that the claimant was a citizen as of August 9, 1969.

The subsidiary company maintained its own payroll on Guam and filed its tax returns and monthly financial statement from Guam. The

subsidiary company also maintains its own computer system, handles its own bidding and estimating, and maintains company housing completely on Guam. The subsidiary representative testified that the Guam subsidiary does not conduct any business within the state of Hawaii and does not maintain any equipment, personnel office or account records, business office, address or telephone number in the state of Hawaii.

On October 17, 1975, the subsidiary company requested forms from the state of Nevada electing coverage under Nevada Unemployment Insurance Law. On November 11, 1975, the employer applied for an employer identification number within the state of Nevada. At the time of the hearing, the subsidiary company had submitted four contribution and wage reports to the state of Nevada employment security department, the earliest of which was on December 24, 1975, and which covered the calendar year 1974. Payment has been tendered in accordance with the amounts reflected on the reports.

The state of Nevada employment security department has stated through its assistant chief of contributions that "if it is ruled that Black Construction Corporation is subject to Hawaii Unemployment Insurance law, and wages are properly reported to that state, Nevada will refund to Black Construction Corporation all contributions for unemployment insurance which were properly paid to the state of Nevada."

REASONS FOR DECISION: Section 383-2(c) of the Hawaii Revised Statutes states:

The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands as provided in paragraph (5) of this subsection), after December 31, 1971 in the employ of an American employer or of this State or of any of its instrumentalities or of any of its political subdivisions (other than service which is deemed employment under the provisions of section 383-3 or the parallel provisions of another state's law) if:

(1) the employer's principal place of business in the United States is located in this State; or

(2) the employer has no place of business in the United States, but

(A) the employer is an individual who is a resident of this State; or

(B) the employer is a corporation which is organized under the laws of this State; or

(C) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other state; or

(3) none of the criteria of paragraphs (1) and (2) of this subsection is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service under the law of this State.

(4) an "American employer", for purposes of this subsection, means a person who is:

(A) an individual who is a resident of the United States; or

(B) a partnership if two-thirds or more of the partners are residents of the United States; or

(C) a trust, if all of the trustees are residents of the United States; or

(D) a corporation organized under the laws of the United States or of any state.

(5) As used in this subsection, the term "United States" includes the states, the District of Columbia, and the Commonwealth of Puerto Rico; and, after December 31 of the year in which the Secretary of Labor approves for the first time an unemployment insurance law of the Virgin Islands submitted to him for approval, the term "United States" shall also include the Virgin Islands.

Section 383-2(d) of the Hawaii Revised Statutes states: The term "employment" shall include an individual's service, wherever performed within the United States, the Virgin Islands or Canada, if (a) such service is not covered under the unemployment compensation law of any other state, the Virgin Islands, or Canada, and (b) the place from which the service is directed or controlled is in this State.

After completely reviewing the evidence presented at the hearing and the respective memorandum submitted by the employer and the Department, the referee finds that employer's principal place of business in the United States, when construed under the provision of section 383-2(c)(1) of the Hawaii Revised Statutes, is located in Hawaii, and therefore finds that the employer is subject to and was properly assessed under the employment insurance laws and regulations of the state of Hawaii.

This case is almost identical to the Hawaiian Rock Products case heard on February 14, 1975 before referee Walter Kirimitsu. In that case, the referee outlined the factors which were deemed relevant in reaching a decision in cases of this nature. These factors are as follows:

(1) determination of the ownership of the employer and the residence of the majority of the stock interest in the employer company;

(2) determination of the state within which the principal officers and directors of the employer corporation are predominately located; and

(3) whether there are any salaried employees of the employer paid within the state seeking to tax for levy contribution.

Furthermore, the referee found in the Hawaiian Rock Products case that the finding of articles of incorporation within the state of Nevada and naming of the attorney's office address as the principal office in the state of Nevada were not sufficient to designate Nevada as the state of coverage for purposes of unemployment insurance benefits.

The parallel between the Hawaiian Rock Products case and this case cannot be denied.

As in the Hawaiian Rock Products case, one hundred percent of ownership of the subsidiary company in this case is held by the Hawaii based corporate entity and is one of several subsidiaries of the parent corporation. At least half, or four out of eight of the principal officers and directors, including the chairman of the board and president of the employer company, are also principal officers of the parent corporation and are predominately located within the state of Hawaii. Several key salaried employees of the employer are paid through the parent corporation located within the state of Hawaii, admittedly for purposes of enabling them to participate in fringe benefits plans of the parent corporation.

Notwithstanding the fact that the employer allegedly maintains a telephone listing within the state of Nevada, there was no evidence to support a conclusion that the listing was anything more than a telephone number within the state of Nevada. There was no evidence to indicate that any corporate offices or employees were paid in the state of Nevada either directly or indirectly by the parent or subsidiary corporations.

The one distinction which may be made between this case and the Hawaiian Rock Products case is that the employer has elected to pay contributions and had in fact made contributions within the state of

Nevada by the time of the hearing. However, the record also indicates that the subsidiary company's election to pay contributions within the state of Nevada came long after it had been established and was conducting its business on Guam using U.S. citizens as employees since 1972. It thus appears that the subsidiary company's election to file its contributions within the state of Nevada came about after the company became aware that the state of Hawaii had deemed the subsidiary company as conducting sufficient business in Hawaii to pay contributions within this state.

It is specifically stated herein that this decision is strictly confined to the subject nature of unemployment insurance coverage and assessements and is therefore not intended to affect the taxpayer-appellant's status within the scope and coverage within the internal revenue code.

DECISION: The letter of determination dated November 26, 1975, and the notice of contribution assessment dated November 26, 1975, of the Unemployment Insurance Division are affirmed herein. The assessment of $328.89 is affirmed.

DAVID L. FONG, Referee

Date Mailed: May 26, 1978
dss

ORIGINAL

NO. 7345

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGERT WIDDIFIELD, Appellees.	CIVIL NO. 54850 APPEAL FROM THE DECISION AND ORDER, FILED FEBRUARY 7, 1979 FIRST CIRCUIT COURT HONORABLE YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF JUDGMENT ON APPEAL

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Attorney for the Department of
Labor and Industrial Relations

ORIGINAL

NO. 7345

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JUDGMENT ON APPEAL

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NOTICE OF JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII:

PLEASE TAKE NOTICE that the Supreme Court of the State of Hawaii has entered the following judgment on appeal:

"Pursuant to the opinion of the Supreme Court of the State of Hawaii filed on Janaury 22, 1982, the judgment of the lower court is affirmed."

DATED: Honolulu, Hawaii, Feb. 16, 1982.

BY THE COURT:

Clerk

The form of the foregoing notice is hereby approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii, Feb. 16, 1982.

Edward H. Nakamura
Justice

NO. 7345

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGERT WIDDIFIELD, Appellees.	CIVIL NO. 54850 APPEAL FROM THE DECISION AND ORDER, FILED FEBRUARY 7, 1979 FIRST CIRCUIT COURT HONORABLE YASUTAKA FUKUSHIMA, JUDGE

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed on January 22, 1982, the judgment of the lower court is affirmed.

DATED: Honolulu, Hawaii, Feb. 16, 1982

BY THE COURT:

Clerk

APPROVED:

Edward H. Nakamura
Justice

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Hawaii Revised Statues

Sec. 383-1

(c) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands as provided in paragraph (5) of this subsection), after December 31, 1971 in the employ of an American employer or of this State or of any of its instrumentalities or of any of its political subdivisions (other than service which is deemed employment under the provisions of section 383-3 or the parallel provisions of another state's law) if:

(1) The employer's principal place of business in the United States is located in this State; or

(2) The employer has no place of business in the United States, but

(A) The employer is an individual who is a resident of this State; or

(B) The employer is a corporation which is organized under the laws of this State; or

(C) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other state; or

(3) None of the criteria of paragraphs (1) and (2) of this subsection is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service under the law of this State.

(4) An "American employer", for purposes of this subsection, means a person who is:

(A) An individual who is a resident of the United States; or

(B) A partnership if two-thirds or more of the partners are residents of the United States; or

(C) A trust, if all of the trustees are residents of the United States; or

(D) A corporation organized under the laws of the United States or of any state.

(5) As used in this subsection, the term "United States" includes the states, the District of Columbia, and the Commonwealth of Puerto Rico; and, after December 31 of the year in which the Secretary of Labor approves for the first time an unemployment insurance law of the Virgin Islands submitted to him for approval, the term "United States" shall also include the Virgin Islands.

26 USC §3306(c) and (j)

(c) **Employment.**—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except—

(1) agricultural labor (as defined in subsection (k)) unless—

(A) such labor is performed for a person who—

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)), or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed before January 1, 1983, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of $1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);

(10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than $50, or

(B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance, or

(C) service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers, or

(D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government—

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, un-

der an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States); or

(18) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(F) or (J)), and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be.

(j) State, United States, and American employer.—For purposes of this chapter—

(1) State.—The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(2) United States.—The term "United States" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(3) American employer.—The term "American employer" means a person who is—

(A) an individual who is a resident of the United States,

(B) a partnership, if two-thirds or more of the partners are residents of the United States,

(C) a trust, if all of the trustees are residents of the United States, or

(D) a corporation organized under the laws of the United States or of any State.

An individual who is a citizen of the Commonwealth of Puerto Rico or the Virgin Islands (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

NO. 7345

IN THE SUPREME COURT OF TH.. STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES; and ROGER WIDDIFIELD, Appellees.	CIVIL NO. 54850 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

FILED
1982 MAY 11 P 3:1
CLERK SUPREME COURT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Black Construction Corporation, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Hawaii entered herein on February 16, 1982.

This appeal is taken pursuant to 28 USC §1257(2).

DATED: Honolulu, Hawaii, May 11, 1982.

Robert S. Katz
ROBERT S. KATZ

Attorney for Appellant
Black Construction Corporation

I do hereby certify that the foregoing is a full, true and correct copy of the original thereof on file in the office of the Clerk of the Supreme Court of the State of Hawaii.

Dated: Honolulu, Hawaii MAY 11 1982

Clerk, Supreme Court, State of Hawaii

NO. 7345

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES; and ROGER WIDDIFIELD, Appellees.	CIVIL NO. 54850 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was duly served upon the following persons by first-class mail:

DWIGHT K. NAKAMOTO
Deputy Attorney General
Department of Labor & Industrial Relations
State of Hawaii
825 Mililani Street
Honolulu, Hawaii 96813

JOSHUA C. AGSALUD
Department of Labor & Industrial Relations
825 Mililani Street
Honolulu, Hawaii 96813

AMADO ROSALES
1822-A Liliha Street
Honolulu, Hawaii 96817

ROGER WIDDIFIELD
1765 Ala Moana Blvd.
Apartment 1097
Honolulu, Hawaii 96815

DATED: Honolulu, Hawaii, May 11, 1982.

Robert S. Katz
ROBERT S. KATZ

Attorney for Appellant
Black Construction Corporation

Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS,
CLERK

82-149

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

APPENDIX

JURISDICTIONAL STATEMENT

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700 Bishop Street
Honolulu, Hawaii 96813
Phone: (808) 521-1051

Attorney for Appellant
Black Construction
Corporation

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

BLACK CONSTRUCTION CORPORATION, Appellant,

v.

JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

APPENDIX A and B

IN THE SUPREME COURT OF THE
STATE OF HAWAII

OCTOBER TERM 1981

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BLACK CONSTRUCTION CORPORATION, Appellant, v. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

NO. 7345

APPEAL FROM THE FIRST CIRCUIT COURT

HONORABLE YASUTAKA FUKUSHIMA, JUDGE

CIVIL NO. 54850

JANUARY 22, 1982

RICHARDSON, C.J., LUM, NAKAMURA, JJ., RETIRED JUSTICES OGATA AND MENOR ASSIGNED BY REASON OF VACANCIES

STATUTES - construction and operation - general rules of construction - intention of legislature - in general.

The primary duty of courts in interpreting and applying statutes is to ascertain the intention of the

legislature and to implement that intention to the fullest degree.

SAME - same - same - extrinsic aids to construction - in general.

SAME - same - particular classes of statutes - liberal or strict construction as affected by nature of act in general - revenue laws.

The rule of strict construction with regard to taxing statutes should only be resorted to as an aid to construction when an ambiguity or doubt is apparent on the face of the statute, and then only after other possible extrinsic aids of construction available to resolve the ambiguity have been exhausted.

SAME - same - general rules of construction - extrinsic aids to construction - in general.

When aid to construction of the meaning of words as used in a statute is available, there is no rule of law which forbids the use of such aid, even though the words may appear clear on superficial examination.

SOCIAL SECURITY - unemployment compensation - in general - construction and operation of statutes.

SAME - same - employment, employees, and employers covered in general - in general.

Under the statutory scheme governing the federal-state system of unemployment insurance, an overseas employer's American base of operations is a "place of business," and the employer is covered by the unemployment insurance law of the state where its American headquarters are located.

SAME - same - in general - in general; purpose.

The assessment of unemployment insurance taxes against an overseas employer bears little or no relation to employment in Hawaii; it is related to employment in foreign commerce.

SAME - same - same - same.

COMMERCE - power to regulate in general - powers remaining in states, and limitations thereon - in general.

In adopting the Social Security Act, Congress declared an intent to allow the states to regulate interstate and foregin commerce in specified ways.

SOCIAL SECURITY - unemployment compensation - in general - constitutional and statutory provisions.

SAME - Funds; payments; amount and period; recovery back - Funds and payments; assignments.

In enacting the Employment Security Amendments of 1970, Congress specifically authorized the State to impose a tax on overseas employers who have ties with the State, but on condition that moneys realized would be channeled into a federal trust fund for purposes related to the federal-state unemployment insurance program.

TAXATION - constitutional requirements and restrictions - constitutional provisions in general.

SAME - nature and extent of power in general - power of state - in general.

As the Due Process Clause does not contemplate that a state may impose a tax on a corporation with which it has no contacts, ties, or

relations, the corporation's activities which are related to a claimed obligation must establish that it has sufficient contacts or ties with the state to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligation.

SAME - same - same - same.

It is reasonable and just for the State to enforce an obligation for unemployment insurance taxes based on overseas employment against a foreign corporation which has more significant contacts, ties, or relations with the State than with any other American jurisdiction.

OPINION OF THE COURT BY NAKAMURA, J.

The question is whether a building contractor organized as a corporation under the laws of Nevada and engaged in construction activity on Guam is subject to the Hawaii Employment Security Law by virtue of HRS §383-2(c).[1] Black Construction

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1/ HRS §383-2(c), in relevant part, reads:

> (c) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands as provided in paragraph (5) of this subsection), after December 31, 1971 in the employ of an American employer or of this State or of any of its instrumentalities or of any of its political subdivisions (other than service which is deemed employment under the provisions of section 383-3 or the parallel provisions of another state's law) if:
>
> (1) The employer's principal place of business in the

Corporation, a wholly owned subsidiary of a Hawaii corporation, E.E. Black, Ltd.,

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1/ cont'd.

United States is located in this State; or

(2) The employer has no place of business in the United States, but

(A) The employer is an individual who is a resident of this State; or

(B) The employer is a corporation which is organized under the laws of this State; or

(C) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other state; or

(3) None of the criteria of paragraphs (1) and (2) of this subsection is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any

challenges a coverage determination made by the Unemployment Insurance Division of the Hawaii State Department of Labor and Industrial Relations (hereafter the Division), raising constitutional as well as statutory objections. But we agree

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1/ cont'd.

state, the individual has filed a claim for benefits, based on such service under the law of this State.

(4) An "American employer", for purposes of this subsection, means a person who is:

(A) An individual who is a resident of the United States; or

(B) A partnership if two-thirds or more of the partners are residents of the United States; or

(C) A trust, if all of the trustees are residents of the United States; or

(D) A corporation organized under the laws of the United States or of any state.

with the decisions reached by the Division, the Referee for Unemployment Compensation Appeals, and the Circuit Court of the First Circuit that Black Construction Corporaton (hereafter Black) is an employer responsible for contributions to the Unemployment Compensation Fund (hereafter the fund) maintained pursuant to HRS Chapter 383 and federal law.

I.

In early 1975, Amado Rosales and Roger Widdifield filed claims for unemployment insurance benefits payable under HRS Chapter 383, the Hawaii Employment Security Law; the claims were premised upon past employment with Black on Guam. The Division determined the claimants were entitled to benefits as they met all conditions for benefit eligibility, including prior employment

by a covered employer. Their employment on Guam, as well as that "of all the U.S. citizen-employees of Black Construction Corporation," was deemed "employment" within the meaning of HRS §383-2(c) since it was service performed by American citizens for an American employer whose principal place of business in the United States was in Hawaii. And as there was no record of contributions to the fund by Black, a "Notice of Contributions Due" was also transmitted to the employer. The assessment was contested, and a full hearing on the coverage question was conducted by the Referee for Unemployment Compensation Appeals.

The Referee noted Black's organization as a corporation under the laws of Nevada but found Black neither maintained an office nor engaged in any construction activity there. He further found Black's activities were centered on

Guam, it was not licensed to act as a building contractor in Hawaii, and it engaged in no construction in Hawaii. That Black filed its yearly corporate reports with the State of Nevada and not with Hawaii was recognized by the Referee. He nonetheless concluded Black was an employer subject to the Hawaii law and not Nevada's for unemployment insurance purposes.

The record made before the Referee indicates Black is part of a Hawaii-based enterprise which extends over the reaches of the Pacific Ocean from the State of Washington to Indonesia. While E.E. Black, Ltd., the parent corporation (hereafter E.E. Black), engages in construction under its own name in Hawaii, it has elected to carry on operations in Washington, Guam, the Trust Territory, the Philippines, and

Indonesia through separately incorporated, wholly owned subsidiaries. But the policy direction for this far-flung business venture consisting of ostensibly separate corporations is furnished by the parent in Honolulu.[2/]

[2/] The pertinent testimony of Robert Chapman, a Black vice-president and also an officer of E.E. Black, reads in part:

> Well, it doesn't only apply to Black Construction, it applies to other subsidiaries of E.E. Black where the corporation at the parent level where we establish certain policies, financial policies, reporting policies, engineering-type of policies and procedures, type of work to be bid on where it's into the private sector or whether to stay away from the private sector because it's looking weak, government sector, things of this nature and following the economy and things to do with how to protect ourselves in escalations and contracts. Recently, we set a policy for the corporation that stated that on all future bids we would put in the bid documents that it was subject to

The record manifests that four of Black's eight corporate officers are also officers of the parent corporation and the other subsidiary corporations. And these four officers who maintain offices and residences in Hawaii are responsible for setting policies and goals effective throughout the enterprise. While Black's day-to-day operations are controlled by its officers on Guam, the "guidelines" for the conduct of business there are established in Honolulu. E.E. Black also performs services from time to time for

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2/ cont'd.
our being satisfied that the owner had financing, sufficient financing, proof of satisfaction to the contractor that the financing was there to complete the project.

Black.[3] There is other evidence of frequent contact and a close relationship between parent and subsidiary. For example, three of Black's officers who live on Guam are on the E.E. Black payroll.

Evidence of Black's compliance with Nevada's Unemployment Insurance Law was also adduced before the Referee. The contention that Black and its American-citizen employees were covered

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[3] Mr. Chapman's testimony in this regard reads in part:

> We do assist at times if they're overloaded among these areas [daily operational requirements] and need some engineering work. They need some shop drawings, things of that nature they can't get out in time; then they'll ask for our assistance or vice-versa. We might ask for theirs, but, whoever works at whoever's else's work is charged back for it.

for unemployment insurance purposes by the Nevada law, however, was overruled on the ground that the compliance was effected some ten months after Black was apprised of the applications for benefits by its former employees under Hawaii law. The Referee found Black's "principal place of business in the United States . . . [was] located in Hawaii" and concluded the Division's assessment of contributions against the employer was proper under HRS §383-2(c)(1). An appeal from the administrative decision to the circuit court followed.

The circuit court reviewed the record made before the Referee and affirmed his decision that the employer was subject to the Hawaii law. The court, however, concluded the employment of American citizens by Black on Guam constituted "employment" within the

meaning of the Hawaii Employment Security Law under HRS §383-2(c)(1) and HRS §383-2(c)(3).

II.

Black initially asserts it is not engaged in business in the United States. But if it can be deemed to be so engaged, it claims the principal place of the corporation's business in the United States is Nevada. Furthermore, the imposition of "an employment tax on a foreign corporation's employment of employees who perform no services in the taxing state," in Black's view, contravenes due process. A review of the record and the applicable law, however, convinces us the assessment of contributions was proper under the Hawaii and the federal laws relating to unemployment insurance and consistent with pertinent due process principles.

A.

Our review commences with an overview of the unemployment insurance system. The passage of the Social Security Act in 1935[4/] "laid the foundation for a cooperative endeavor between the states and the nation" to meet the problem of unemployment, for the portions of the Act relevant here represented "an attempt to find a method by which the states and the federal government could 'work together to a common end.'" Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, 363 (1939) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 588 (1937)). Although it recognized the "problem had become

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4/ Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.).

national in area and dimensions," Steward Machine Co. v. Davis, supra, at 586, Congress adopted a remedial expedient that actuated state action by imposing a federal payroll tax[5] on private employers but permitting tax credits of up to ninety per cent of the federal tax for their contributions to federally approved state unemployment compensaton funds.[6] "That . . . [the Act] was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not alter the fact that there were great practical inducements for the states to become

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5/ The relevant provisions are now codified in the Internal Revenue Code as the Federal Unemployment Tax Act (26 U.S.C. §§3301-3311).

6/ See 26 U.S.C. §3302 (1970).

components of a unitary plan for unemployment relief." Buckstaff Bath House Co. v. McKinley, supra, at 363. "The federal Act . . . [was] obviously an invitation to the states to enter the field," Standard Dredging Corp. v. Murphy, 319 U.S. 306, 310 (1943), and "a coordinated and integrated dual system" of unemployment insurance was established. Buckstaff Bath House Co. v. McKinley, supra, at 364.

The first major changes in this unified scheme were embodied in the Employment Security Amendments of 1970.[7/] While the most consequential

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7/ Pub. L. No. 91-373, 84 Stat. 695 (1970).

The Senate report accompanying the measure summarized its purposes as follows:

> The bill would extend the coverage of the unemployment compensation program to

amendment probably was one that established a permanent federal benefit plan designed to operate in conjunction with the regular state programs to provide additional unemployment benefits for persons who exhaust their state benefits during periods of high

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7/ cont'd.
additional jobs, establish a permanent program of extended benefits for people who exhaust their regular State benefits during periods of high unemployment, provide the States with a procedure for obtaining judicial review of certain adverse determinations by the Secretary of Labor, improve the financing of the program, provide certain limited requirements for State unemployment compensation programs which are designed to protect the integrity of the program, and make other changes to strengthen the Federal-State unemployment compensation system.

S. Rep. No. 91-752, 91st Cong., 2d Sess. ____, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 3606, 3607.

unemployment, the changes effecting substantial extensions in the coverage of the federal-state program were also significant. The pertinent coverage extension was effected by amending the definition of "employment" as the term appears in the Federal Unemployment Tax Act[8] to include:

> any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation or in the Virgin Islands) by a citizen of the United States as an employee of an American employer.[9]

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[8] If a person performs services constituting "employment" as defined, both he and his employer are covered by the Act.

[9] Now codified in 26 U.S.C. §3306(c).

An "American employer" was defined to include "a corporation organized under the laws of the United States or of any State."[10/]

The obvious congressional design was to afford unemployment insurance coverage for "construction personnel employed overseas by American contractors engaged in overseas construction work" by stimulating state action to provide the protection.[11/] That Congress expected

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10/ Now codified in 26 U.S.C. §3306(j)(3).

11/ The Senate report referred to earlier stated in part:

> In recent years, the number of U.S. citizens working for American employers abroad has greatly increased, due primarily to the large number of construction personnel employed overseas by American contractors engaged in overseas construction work for the armed services. While the total number of individuals involved --

11/ cont'd.
approximately 160,000 -- is a very small proportion of the total work force, it is a substantial number. When these individuals, after completing their work overseas, seek work in the United States, they are not eligible to receive unemployment benefits. Some States have become increasingly concerned over the problem. A State, however, may be reluctant to cover overseas contractors based in that State, because by doing so it may place the contractors operating out of that State at a competitive disadvantage in relation to contractors operating out of States which do not cover employment outside the United States.

The Federal unemployment tax has in the past been an effective device for removing interstate competition as an impediment to coverage by State laws. Because the credits against the Federal tax results in a combined net Federal and State tax lower, in most cases, than the full Federal tax, States have been prompt to extend State coverage to employment subject to the Federal tax and employers have been quick to seek State law coverage when they become subject to the Federal tax.

prompt and favorable responses to the stimulus is also a matter of record.12/ And the "invitation" was subsequently reiterated by the agency charged with the administration of the federal aspects of the integrated program, the Unemployment Insurance

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11/ cont'd.
S. Rep. No. 91-752, 91st Cong., 2d Sess. ___, reprinted in 1970 U.S. CODE CONG. & AD. news 3606, 3621.

12/ S. Rep. No. 91-752 also stated in pertinent part:

> The bill would apply the Federal tax to the wages earned by individuals in overseas employment for American employers without specifying coverage in any State. It is anticipated that States will act to cover this type of employment, as they have in the past when other employers became subject to the Federal tax without being subject to the basic coverage provisons of any State law.

Id.

Service of the United States Department of Labor, through specific proposals submitted to the states for possible legislative action.

Hawaii's response was prompt and predictable; HRS Chapter 383 was extensively amended in 1971 to accommodate changes in the federal law made by the Employment Security Amendments of 1970,[13/] and the

13/ See S.L.H. 1971, c. 187, and Sen. Stand. Comm. Rep. No. 429, in 1971 Senate Journal 977. The committee report stated the purpose of the bill which became Act 187 as follows:

> The purpose of this bill is to amend the Hawaii Employment Security Law in several respects to make it conform to new federal standards for state unemployment compensation laws enacted in P. L. 91-373, popularly known as the "Employment Security Amendments of 1970."

Id. at 977-78.

amendatory language followed these amendments and the suggestions for implementaion prepared by the federal agency.[14] In text, HRS §383-2(c) thus represents a nearly verbatim replication of those provisions of the federal Draft Legislation tailored to effect state unemployment insurance coverage of the overseas employment of American citizens by American employers.[15]

14/ See UNEMPLOYMENT INSURANCE SERVICE, U.S. DEPARTMENT OF LABOR, DRAFT LEGISLATION TO IMPLEMENT THE EMPLOYMENT SECURITY AMENDMENTS OF 1970 . . . H.R. 14705 -- TOGETHER WITH EXPLANATORY COMMENTARY (hereafter Draft Legislation).

15/ Id. at 9-10.

B.

Black concedes it is an American employer for whom services have been performed outside the United States by American citizens and that it therefore is subject to the federal payroll tax imposed by 26 U.S.C. §3301 (the Federal Unemployment Tax). But it contests coverage under HRS Chapter 383, claiming (1) the Hawaii Employment Security Law cannot apply to a corporation incorporated under the laws of Nevada that does no business in the United States and (2) whatever may be due by way of state unemployment insurance contributions is owed to Nevada under provisions of the Nevada Unemployment Compensation Law paralleling HRS

§383-2(c)(2).[16]

Quoting familiar canons of statutory construction, it argues the relevant term, "place of business," cannot include Hawaii where Black and its business are concerned. That the headquarters of the enterprise of which it is a part are situated in Honolulu and

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16/ HRS §383-2(c)(2) reads in pertinent part:

> (c) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States . . . in the employ of an American employer . . . if:
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> . . . .
>
> (2) The employer has no place of business in the United States, but
>
> . . . .
>
> (B) The employer is a corporation which is organized under the laws of this State.

that activity related to the business in Guam transpires there do not, in its opinion, render Hawaii a place where Black is engaged in business. For statutes imposing taxes, it contends, should be "strictly construed in favor of the taxpayer" and the words used therein "should be taken in their popular sense." Any reading other than a narrow one favoring the taxpayer, it also infers, "would create a substantial doubt as to the statute's constitutional validity." But we do not consider the foregoing canons controlling; nor do we believe Hawaii's assessment of unemployment insurance contributions against Black would engender "serious constitutional problems."

"[O]ur primary duty [in interpreting and applying statutes] is to ascertain the intention of the legislature and to implement that

intention to the fullest degree." Keller v. Thompson, 56 Haw. 183, 189, 532 P.2d 664, 669 (1975). "[T]he rule of strict construction with regard to taxing statutes should only be resorted to 'as an aid to construction when an ambiguity or doubt is apparent on the face of the statute, and then only after other possible extrinsic aids of construction available to resolve the ambiguity have been exhausted.' Bishop Trust Company v. Burns, 46 Haw. 375, 399-400, 381 P.2d 687, 701 (1963)." In re Hawaiian Telephone Co., 61 Haw. 572, 578-79, 608 P.2d 383, 388 (1980).

Black, however, discerns no ambiguity in the statute, asserts the words should be read in their "popular sense," and claims Guam is the only place where it conducts business. But "place of business" and "doing business" have lent themselves to many meanings as even

a cursory review of relevant case law reveals. See 32A Words and Phrases 140-153 and In re Heftel Broadcasting Honolulu, 57 Haw. 175, 180 n. 4, 554 P.2d 242, 246 n. 4 (1976), cert. denied, 429 U.S. 1073 (1977).[17/] Moreover, "[w]hen aid to construction of the meaning of words, as used in the state is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940) (footnotes omitted); Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976). And when there is a plethora of material

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17/ There, we said "that significantly more business activity is required for qualification purposes than for taxing jurisdiction."

evidencing legislative purpose and intent, there is no reason for a court to seek refuge in "strict construction," "plain meaning," or "the popular sense of the words."

1.

HRS §383-2(c), as we have seen, was enacted in 1971 to bring overseas employment of American citizens by American contractors within the ambit of the Hawaii Employment Security Law. It was passed to implement a decision by Congress to cover service performed outside the United States under the unitary system of unemployment insurance which was established by the Social

Security Act.[18] The implementing language of Act 187, S.L.H. 1971, is also of federal derivation. See notes 14 and 15 supra. The expressions of purpose and intent in source material consisting of legislative reports and documents prepared by the agency charged with oversight of the federal aspects of the integrated system tell us that "place of

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18/ That the interests furthered by the State legislative action are federal as well as local is obvious. Furthermore, the taxes collected from employers as a result of the expanded coverage of the Hawaii law are not part of the State's general revenues. The moneys collected are placed in a special fund and subsequently deposited in the federal unemployment trust fund established and maintained pursuant to §904 of the Social Security Act, as amended. See HRS §§383-121 and 383-122. Benefit payments are made from the trust fund when claims for unemployment insurance benefits are made by eligible claimants who may or may not be residents of Hawaii.

business" necessarily has a broader connotation than the situs of a building contractor's activity abroad or the state under whose laws it may be organized as a legal entity.

In adopting the employment Security Amendments of 1970, Congress assumed that an American employer engaged in business abroad ordinarily has an American base from which it operates.[19/] Relevant provisions of the Draft Legislation described this "base" in terms of "the employer's principal place of business in the United States." See Draft Legislation, at 9. The commentary thereon delineated the

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19/ See, e.g., note 11 supra, where a relevant portion of S. Rep. No. 91-752, 91st Cong., 2d Sess., is reproduced. A clear design to induce a state to expand the coverage of its law "to cover overseas contractors based in that State" is reflected there.

primary considerations in determining "principal place of business" as follows:

> The basic test applied is whether the employer's principal place of business in the United States is located in the State. If it is, the service is covered in that State. Principal place of business in the United States refers to the employer's headquarters in the United States, the business address where its highest officers in the United States are located. The employers of the great majority of U.S. citizens working for American employers outside the United States have a place of business in the United States. In some cases, however, an American employer may be physically located entirely outside the United States and have no place of business in the United States.

Draft Legislation, at 33-34. Hence, the governing federal-state scheme regards an overseas employer's American base as a

"place of business"; it also contemplates that the employer will be brought into the integrated system under the laws of the state where its American headquarters are located.

The State Unemployment Insurance Division, the Referee for Unemployment Compensation Appeals, and the circuit court agreed Black was subject to the Hawaii Employment Security Law pursuant to HRS §383-2(c)(1),[20/] inasmuch as its

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20/ HRS §383-2(c)(1) reads in pertinent part:

> (c) The term "employment" shall include the service of an individual who is a citizen of the United States . . . in the employ of an American employer . . . if:
>
> (1) The employer's principal place of business in the United States is located in this State.

highest officers are in Hawaii. We likewise encounter no difficulty in concluding Black has an American base and its "principal place of business in the United States is located in this State."

20/ cont'd.

The circuit court also found Black was subject to the law by reason of HRS §383-2(c)(3). We agree with the employer that this subsection is inapplicable because Black has a place of business in the United States. But "we have repeatedly held that where the . . . [lower] court has reached a correct conclusion, its decision will not be disturbed on the ground that the reasons it gave for its action were erroneous." Hawaii Carpenters' Trust Funds v. Aloe Dev. Corp., 63 Haw. 566, 578, 633 P.2d 1106, 1113 (1981); Federal Elec. Corp. v. Fasi, 56 Haw. 57, 64, 527 P.2d 1284, 1289-90 (1974); accord, Okuna v. Nakahuna, 60 Haw. 650, 656, 594 P.2d 128, 132 (1979); Cain v. Cain, 59 Haw. 32, 36, 575 P.2d 468, 472 (1978); Waianae Model Neighborhood Area Ass'n v. City & County, 55 Haw. 40, 43, 514 P.2d 861, 864 (1973).

For "the employer's headquarters in the United States," from which its highest officers direct the corporation, are here.

2.

But Black contends the State's assessment of unemployment insurance contributions on service rendered abroad for a Nevada corporation contravenes due process. Viewing the contributions as an "employment tax" exacted for the privilege of hiring employees, it maintains the levy is fundamentally unfair as Black neither recruits, hires, nor has work performed by employees in Hawaii.[21/] Given the nature of our system of unemployment insurance and the

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21/ Although it neither recruits, hires, nor has work performed by employees in Nevada, Black apparently does not consider a similar levy by Nevada fundamentally unfair.

purpose and intent of HRS §383-2(c), we can only conclude that the contentions lack merit.

Black professes to find primary support for its proposition in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and In re Heftel Broadcasting Honolulu, supra. In International Shoe, the Supreme Court upheld the State of Washington's imposition of an "employment tax" on a foreign corporate employer on the basis of substantial services rendered the employer by employees within the state. And in Heftel, we said jurisdiction to impose a privilege tax, the general excise, hinged upon a reasonable fiscal relationship between the tax and the protection, opportunities, and benefits afforded the taxpayer by the State. 56 Haw. at 182, 554 P.2d at 247. Since no construction worker performs service

for Black in Hawaii and a tax-benefit nexus is not apparent, it argues the exaction of an "employment tax" in this case must perforce be invalid. We have no doubt that the cases proclaim sound principles of due process. Yet within the relevant statutory context, International Shoe lends no support to Black's cause and Heftel cannot be assigned controlling precedential weight.

The assessment against Black bears little or no relation to employment in Hawaii; it is related instead to employment in foreign commerce. What would otherwise be an unsupportable invasion of a congressional preserve, however, has been sanctioned by prior design. For Congress, in adopting the governing statutory scheme envisioned that the State would regulate interstate and foreign commerce "in specified ways." International Shoe Co. v.

Washington, supra, 326 U.S. at 315.[22/]

22/ The Court's statement in this regard reads as follows:

> Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U.S.C. §1606(a) provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334; Perkins v. Pennsylvania, 314 U.S. 586; Standard Dredging Corp. v. Murphy, 319 U.S. 306, 308; Hooven & Allison Co. v. Evatt, 324 U.S. 652, 679; Southern Pacific Co. v. Arizona, 325 U.S. 761, 769.

Consistently therewith, the Employment Security Amendments of 1970 specifically authorized, indeed encouraged, the imposition of a burden on overseas employers who maintain contacts with Hawaii. The authorization, however, was subject to a condition that the moneys realized would be channeled into a federal trust fund for purposes related to the federal-state unemployment insurance program. See note 18 supra and HRS §§383-121 through 383-125. The nature of the assessment thus renders an application of the Heftel test to determine state taxing jurisdiction inapposite.

22/ cont'd.
326 U.S. at 315.

53 Stat. 1391, 26 U.S.C. §1606(a), is presently codified as 26 U.S.C. §3305(a).

But the subjection of Black to liability for contributions still turns on an establishment of its "presence" in Hawaii. The Due Process Clause does not contemplate that a state may impose a tax on a corporation with which it has "no contacts, ties, or relations." See International Shoe Co. v. Washington, supra, 326 U.S. at 318-21. The operations or activities of the corporation as they are related to a claimed obligation must establish that it has "sufficient contacts or ties with the state . . . to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce" the obligation. Id. at 320. Black concedes the orderly administration of the phase of the unemployment insurance system at issue requires the exaction of contributions from overseas employers by

one of the states. Since Black's American ties are with Hawaii and Nevada, the precise question is whether it would be reasonable and just for Hawaii, rather than Nevada, to enforce the obligation.

Black's "presence" in Nevada is premised upon its organization under the laws of that state.[23] The "presence," albeit a legal one, may be characterized as more fictional than factual.[24] By

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23/ As Black claims to engage in no business in the United States, we have little doubt that its organizers selected Nevada as the place of incorporation for reasons not relevant here. But we have reason to believe Nevada was chosen for the same reason Delaware is so often a place of incorporation. It is no secret that "Nevada has attempted to become the western Delaware." Cary, Federalism and Corporate Law: Reflections Upon Delaware. 83 Yale L.J. 663, 665 (1974).

24/ See International Shoe Co. v. Washington, supra, 326 U.S. at 316.

admission, the activities in Nevada are confined to the filing of statutorily mandated reports and the appointment of an agent through whom service of process upon the corporation may be effected. In contrast, Black's "presence" in Hawaii is a factual presence. Its parent and its highest ranking corporate fiduciaries are in Hawaii, corporate policies are determined here, and the parent performs services on its behalf here. Hawaii unquestionably serves as Black's American base of operations. It is reasonable and just for Hawaii to enforce the obligation in question, for Black has more significant contacts, ties, or relations with Hawaii than with any other American jurisdiction.[25/]

25/ Our decision also raises no problem of comity as Nevada has indicated a willingness to defer to Hawaii in this matter.

Affirmed.

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with him on opening
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; and AMADO E. ROSALES; and ROGER WIDDIFIELD, Appellees.	CIVIL NO. 54850 DECISION AND ORDER

DECISION AND ORDER

The above-entitled case is an Appeal by BLACK CONSTRUCTION CORPORATION from Referee's Decision No. 1186-75A, Employment Security Appeals Referees Office, Department of Labor and Industrial Relations, State of Hawaii, dated May 26, 1978, affirming a determination by the Unemployment Insurance Division of the Department of Labor and Industrial Relations, dated November 26, 1976, that Claimant Amado E. Rosales and all of the U.S. citizen-employees of BLACK CONSTRUCTION CORPORATION on Guam were covered for unemployment insurance purposes under the provisions of the Hawaii Employement Security Law, Chapter 383, Hawaii Revised Statutes.

The issues before the Court were whether services performed by U.S.

citizens on Guam for the BLACK CONSTRUCTION CORPORATION constituted "employment" taxable by Hawaii under §383-2(c), H.R.S.; and whether the imposition by Hawaii of said employment tax on services performed in Guam was unconstitutional under the due process clauses of the 14th Amendment of the U.S. Constitution and Article I, §4 of the Hawaii Constitution.

This case having been submitted to the Court on the record and written briefs of the parties hereto, the parties having made oral argument to the Court, and the Court being duly apprised in the premises, and having duly considered all pleadings, finds that the Referee's decision is supported by the Record.

The Court further finds that the State of Hawaii has jurisdiction to tax the services performed by U.S. citizen-employees on Guam for the BLACK

CONSTRUCTION CORPORATION not only under §383-2(c)(1), H.R.S., but also under §383-2(c)(3), H.R.S. With regard to §383-2(c)(1), H.R.S., the Court finds that BLACK CONSTRUCTION CORPORATION'S highest officers are located in the State of Hawaii, and that BLACK CONSTRUCTION CORPORATION'S principal place of business in the United States is located in the State of Hawaii.

Lastly, the Court finds that the imposition of said employment tax by the State of Hawaii on the services performed in Guam is constitutional under the due process clauses of the 14th Amendment of the U.S. Constitution and Article I, §4 of the Hawaii Constitution.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Referee for Employment Security Appeals, numbered 1186-75A and dated May 26, 1978, be modified as to its

basis to include jurisdiction of the State of Hawaii under §383-2(c)(3), H.R.S., and be affirmed as to its result.

DATED: Honolulu, Hawaii, Feb. 7, 1979.

/s/ Yasutaka Fukushima
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

ROBERT S. KATZ
Attorney for Appellant
BLACK CONSTRUCTION
CORPORATION

MS-95.05

STATE OF HAWAII
DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS
APPEALS REFEREES' OFFICE

In the Matter of the Claim of:	Referee's Decision: 1186-75A
Amado E. Rosales, et al, 1822-A Liliha Street Honolulu, HI 96817	Date Appeal Filed: December 12, 1975
Claimant SSA NO. 575-66-8621	Section of Hawaii Employment Security Law: 383-6
	Time and Place of Hearing: 1:30 p.m., May 6, 1976 Honolulu, Hawaii
Black Construction Corp., c/o Robert S. Katz, Esq., 700 Bishop Street, Suite 1512 Honolulu, HI 96813	Parties Present: Employer Employer's Representatives Counsel for Employer Claimant Department Representatives
Employer-Appellant	

Black Construction Corporation, hereinafter referred to as employer, appealed from the letter of determination

dated November 26, 1975, and notice of contribution assessment dated November 26, 1975, both issued by the Unemployment Insurance Division of the State of Hawaii.

Employer filed a letter of appeal on December 11, 1975, transmitting therewith its payment in the assessed sum of $328.88.

STATEMENT OF FACTS: The employer was incorporated in the state of Nevada in 1964, and is engaged in the business of general contracting of heavy construction. All construction operations are carried on in Guam. There are no offices or equipment in Nevada, nor does the company have any construction operations within that state. The company files yearly corporate reports in the state of

Nevada. No corporate reports have ever been filed in the state of Hawaii, and the employer does not possess a license to carry on business in the state of Hawaii. Employer pays no excise tax in the state of Hawaii. The employer alleges that it maintains an address and telephone in the state of Nevada and has a Nevada attorney act as its designated agent within that state.

The company is a wholly owned subsidiary of a large Hawaii corporation. The company has eight corporate officers, several of whom are also officers of the parent company. Four officers of the company reside in the state of Hawaii.

During the hearing, the company submitted documentary evidence to establish that it has been contributing to the unemployment

insurance fund in the state of Nevada for all of its United States citizen employees on Guam.

One of the witnesses appearing on behalf of the company stated that several of the key salaried employees of the company are paid through the parent company. This was reportedly to enable them to participate in certain fringe benefits programs. The company representative further maintained that all such payments were reimbursed by the parent company. Accounting and personnel functions are conducted on Guam. Tax returns, most of the financial statements, and payroll are prepared in the company office on Guam and are forwarded to Honolulu for review. The company representative testified that in the event that any of its corporate officers of the parent company in Honolulu perform services for

the Guam company, any payments made for these services are charged back to the Guam subsidiary.

Policy decisions are made by the officers who reside in Hawaii. All decisions regarding the day-to-day regular activities of the employer are purportedly made on Guam by the officers who live and reside on Guam, and these Guamanian officers coordinate the major activities of the company. The policies which are established in Honolulu include financial policies, reporting policies, engineering policies and procedures, and contract policies. There are no scheduled meetings of the officers of the corporation. Meetings between the officers who reside in Honolulu and the officers located on Guam are held only if

one of the officers from Honolulu has other business on Guam or if one of the officers from Guam is in Honolulu.

On February 10, 1975, claimant filed an initial claim for unemployment benefits in the state of Hawaii. The record indicates that claimant worked for the subsidiary company on Guam from September 19, 1972 to October 31, 1973, and from November 30, 1973 to January 2, 1975. Claimant is, and at all times relevant to this proceeding was, an American citizen. During the course of the hearing, a certificate of naturalization, #9270585, was introduced into evidence indicating that the claimant was a citizen as of August 9, 1969.

The subsidiary company maintained its own payroll on Guam and filed its tax returns and monthly financial statement from Guam. The subsidiary company also maintains its own computer system, handles its own bidding and estimating, and maintains company housing completely on Guam. The subsidiary representative testified that the Guam subsidiary does not conduct any business within the state of Hawaii and does not maintain any equipment, personnel office or account records, business office, address or telephone number in the state of Hawaii.

On October 17, 1975, the subsidiary company requested forms from the state of Nevada electing coverage under Nevada Unemployment Insurance Law. On November 11, 1975, the employer applied for an employer identification number within the state of Nevada. At the time

of the hearing, the subsidiary company had submitted four contribution and wage reports to the state of Nevada employment security department, the earliest of which was on December 24, 1975, and which covered the calendar year 1974. Payment has been tendered in accordance with the amounts reflected on the reports.

The state of Nevada employment security department has stated through its assistant chief of contributions that "if it is ruled that Black Construction Corporation is subject to Hawaii Unemployment Insurance law, and wages are properly reported to that state, Nevada will refund to Black Construction Corporation all contributions for unemployment insurance which were properly paid to the state of Nevada."

REASONS FOR DECISION: Section 383-2(c) of the Hawaii Revised Statutes states: The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands as provided in paragraph (5) of this subsection), after December 31, 1971 in the employ of an American employer or of this State or of any of its instrumentalities or of any of its political subdivisions (other than service which is deemed employment under the provisions of section 383-3 or the parallel provisions of another state's law) if:

(1) the employer's principal place of business in the United States is located in this State; or

(2) the employer has no place of business in the Unied States, but

(A) the employer is an individual who is a resident of this State; or

(B) the employer is a corporation which is organized under the laws of this State; or

(C) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other state; or

(3) none of the criteria of paragraphs (1) and (2) of this subsection is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service under the law of this State.

(4) an "American employer", for purposes of this subsection, means a person who is:

(A) an individual who is a resident of the United States; or

(B) a partnership if two-thirds or more of the partners are residents of the United States; or

(C) a trust, if all of the trustees are residents of the United States; or

(D) a corporation organized under the laws of the United States or of any state.

(5) As used in this subsection, the term "United States" includes the states, the District of Columbia, and the Commonwealth of Puerto Rico; and, after December 31 of the year in which the Secretary of Labor approves for the first time an unemployment

insurance law of the Virgin Islands submitted to him for approval, the term "United States" shall also include the Virgin Islands.

Section 383-2(d) of the Hawaii Revised Statutes states: The term "employment" shall include an individual's service, wherever performed within the United States, the Virgin Islands or Canada, if (a) such service is not covered under the unemployment compensation law of any other state, the Virgin Islands, or Canada, and (b) the place from which the service is directed or controlled is in this State.

After completely reviewing the evidence presented at the hearing and the respective memorandum submitted by the employer and the Department, the referee finds that employer's principal place of business in the United States, when

construed under the provisions of section 383-2(c)(1) of the Hawaii Revised Statutes, is located in Hawaii, and therefore finds that the employer is subject to and was properly assessed under the employment insurance laws and regulations of the state of Hawaii.

This case is almost identical to the Hawaiian Rock Products case heard on February 14, 1975 before referee Walter Kirimitsu. In that case, the referee outlined the factors which were deemed relevant in reaching a decision in cases of this nature. These factors are as follows:

(1) determination of the ownership of the employer and the residence of the majority of the stock interest in the employer company;

(2) determination of the state within which the principal officers and directors of the employer corporation are predominately located; and

(3) whether there are any salaried employees of the employer paid within the state seeking to tax for levy contribution.

Furthermore, the referee found in the Hawaiian Rock Products case that the finding of articles of incorporation within the state of Nevada and naming of the attorney's office address as the principal office in the state of Nevada were not sufficient to designate Nevada as the state of coverage for purposes of unemployment insurance benefits.

The parallel between the Hawaiian Rock Products case and this case cannot be denied.

As in the Hawaiian Rock Products case, one hundred percent of ownership of the subsidiary company in this case is held by the Hawaii based corporate entity and is one of several subsidiaries of the parent corporation. At least half, or four out of eight of the principal officers and directors, including the chairman of the board and president of the employer company, are also principal officers of the parent corporation and are predominately located within the state of Hawaii. Several key salaried employees of the employer are paid through the parent corporation located within the state of Hawaii, admittedly for purposes of enabling them to participate in fringe benefits plans of the parent corporation.

Notwithstanding the fact that the employer allegedly maintains a telephone listing within the state of Nevada, there was no evidence to support a conclusion that the listing was anything more than a telephone number within the state of Nevada. There was no evidence to indicate that any corporate offices or employees were paid in the state of Nevada either directly or indirectly by the parent or subsidiary corporations.

The one distinction which may be made between this case and the Hawaiian Rock Products case is that the employer has elected to pay contributions and had in fact made contributions within the state of Nevada by the time of the hearing. However, the record also indicates that the subsidiary company's election to pay contributions within the state of Nevada came long after it had been established

and was conducting its business on Guam using U.S. citizens as employees since 1972. It thus appears that the subsidiary company's election to file its contributions within the state of Nevada came about after the company became aware that the state of Hawaii had deemed the subsidiary company as conducting sufficient business in Hawaii to pay contributions within this state.

It is specifically stated herein that this decision is strictly confined to the subject nature of unemployment insurance coverage and assessments and is therfore not intended to affect the taxpayer-appellant's status within the scope and coverage within the internal revenue code.

DECISION: The letter of determination dated November 26, 1975, and the notice of contribution assessment dated November 26, 1975, of the Unemployment Insurance Division are affirmed herein. The assessment of $323.88 is affirmed.

/s/ DAVID L. FONG, Referee

Date Mailed: May 26, 1978
dss

NO. 7345

IN THE SUPREME COURT OF
THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION,	CIV. NO. 54850
Appellant,	APPEAL FROM THE DECISION AND ORDER, FILED
vs.	FEBRUARY 7, 1979
JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGERT WIDDIFIELD,	FIRST CIRCUIT COURT HONORABLE YASUTAKA FUKUSHIMA, JUDGE
Appellees.	

NOTICE OF JUDGMENT ON APPEAL

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NO. 7345

IN THE SUPREME COURT OF
THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGERT WIDDIFIELD, Appellees.	CIV. NO. 54850 APPEAL FROM THE DECISION AND ORDER, FILED FEBRUARY 7, 1979 FIRST CIRCUIT COURT HONORABLE YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII:

PLEASE TAKE NOTICE that the Supreme Court of the State of Hawaii has entered the following judgment on appeal:

"Pursuant to the opinion of the Supreme Court of the State of Hawaii filed on January 22, 1982, the judgment of the lower court is affirmed."

DATED: Honolulu, Hawaii Feb. 16, 1982.

BY THE COURT:

/s/ Clerk
CLERK

The form of the foregoing notice is hereby approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii, Feb. 16, 1982.

/s/ Edward H. Nakamura
Justice

NO. 7345

IN THE SUPREME COURT OF
THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION,	)	CIV. NO. 54850
Appellant,	)	APPEAL FROM THE DECISION AND ORDER, FILED
vs.	)	FEBRUARY 7, 1979
JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGERT WIDDIFIELD,	)	FIRST CIRCUIT COURT HONORABLE YASUTAKA FUKUSHIMA, JUDGE
Appellees.	)	

JUDGMENT ON APPEAL

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NO. 7345

IN THE SUPREME COURT OF
THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION,	)	CIV. NO. 54850
Appellant,	)	APPEAL FROM THE DECISION AND ORDER, FILED
vs.	)	FEBRUARY 7, 1979
JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGERT WIDDIFIELD,	)	FIRST CIRCUIT COURT
	)	HONORABLE YASUTAKA FUKUSHIMA, JUDGE
Appellees.	)	

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii

filed on January 22, 1982, the judgment of the lower court is affirmed.

DATED: Honolulu, Hawaii, Feb. 16, 1982.

BY THE COURT:

/s/ Clerk
CLERK

APPROVED:

/s/ Edward H. Nakamura
Justice

U.S. CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the

United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a

member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss

or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(c) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands as provided in paragraph (5) of this subsection), after December 31, 1971 in the employ of an American employer or of this State or of any of its instrumentalities or of any of its political subdivisions (other than service which is deemed employment under the provisions of section 383-3 or the parallel provisions of another state's law) if:

(1) The employer's principal place of business in the United States is located in this State; or

(2) The employer has no place of business in the United States, but

(A) The employer is an individual who is a resident of this State; or

(B) The employer is a corporation which is organized under the laws of this State; or

(C) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any one other state; or

(3) None of the criteria of paragraphs (1) and (2) of this subsection is met but the employer has elected coverage in this State or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service under the law of this State.

(4) An "American employer", for purposes of this subsection, means a person who is:

(A) An individual who is a resident of the United States; or

(B) A partnership if two-thirds or more of the partners are residents of the United States; or

(C) A trust, if all of the trustees are residents of the United States; or

(D) A corporation organized under the laws of the United States or of any state.

(5) As used in this subsection, the term "United States" includes the states, the District of Columbia, and the Commonwealth of Puerto Rico; and, after December 31 of the year in which the Secretary of Labor approves for the first time an unemployment insurance law of the Virgin Islands submitted to him for approval, the term "United States" shall also include the Virgin Islands.

(c) Employment.--For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States,

if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and

(B) any service, of whatever nature, performed after 1971 outside the United States (except ;in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except--

(1) agricultural labor (as defined in subsection (k)) unless--

(A) such labor is performed for a person who--

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals

employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)), or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed before January 1, 1982, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(2) domestic service in a private home, local college club, or local chapter of a college fraternity or

sorority unless performed for a person who paid cash remuneration of $1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if--

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day

service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is--

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by sectin 3301.

(8) service performed in the employ of a religious, charitable, educational,

or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);

(10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than $50, or

(B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college,or university, or (ii) by the spouse of such a student, if such spouse

is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance, or

(C) service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such

program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers, or

(D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government--

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance

agent or as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount

of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except--

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner

provided for determining the register tonnage of merchant vessels under the laws of the United States); or

(18) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(F) or (J)), and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be.

(j) State, United States, and American employer.--For purposes of this chapter--

(1) State.--The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(2) United States.--The term "United States" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(3) American employer.--The term "American employer" means a person who is--

(A) an individual who is a resident of the United States,

(B) a partnership, if two-thirds or more of the partners are residents of the United States,

(C) a trust, if all of the trustees are residents of the United States, or

(D) a corporation organized under the laws of the United States or of any State.

An individual who is a citizen of the Commonwealth of Puerto Rico or the Virgin Islands (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

NO. 7345

IN THE SUPREME COURT OF
THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees.	CIV. NO. 54850 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Black Construction Corporation, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court

NO. 7345

IN THE SUPREME COURT OF
THE STATE OF HAWAII

OCTOBER TERM 1981

BLACK CONSTRUCTION CORPORATION, Appellant, vs. JOSHUA C. AGSALUD, Director of the Department of Labor and Industrial Relations, State of Hawaii; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees.	CIV. NO. 54850 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was duly served upon the following

of the State of Hawaii entered herein on February 16, 1982.

This appeal is taken pursuant to 28 USC §1257(2).

DATED: Honolulu, Hawaii, May 11, 1982.

/s/ ROBERT S. KATZ

Attorney for Appellant
Black Construction
Corporation

persons by first-class mail:

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DATED: Honolulu, Hawaii, May 11, 1982.

/s/ ROBERT S. KATZ

Attorney for Appellant
Black Construction
Corporation

82-149

Office - Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM _____

BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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H.R.S. Section 383-2(c) 2

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM _____

BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

The Appellee Joshua C. Agsalud, Director, Department of Labor and Industrial Relations, State of Hawaii, respectfully moves to dismiss or affirm the judgment of the Supreme Court of Hawaii on the grounds that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

The Jurisdictional Statement filed by Appellant has set forth the statute, and constitutional provision involved. Those matters need not be repeated here.

QUESTION PRESENTED

Whether Hawaii's rather than Nevada's collection of unemployment insurance contributions from Black Construction pursuant to section 383-2(c), H.R.S., violates Black Construction Corporation's due process guarantee under the federal constitution.

STATEMENT OF THE CASE

Black Construction Corporation (hereinafter "Black") is incorporated in the state of Nevada. Black's activities, however, in Nevada are limited to the filing of statutorily required reports and the appointment of an agent through whom service of process may be made.

Black is the wholly owned subsidiary of E.E. Black, Ltd. E.E. Black is a Hawaii corporation.

Black has eight officers, several of whom are also officers of E.E. Black, Ltd. Of these eight, Black's President, two Vice-Presidents, and Treasurer reside in Honolulu. The salaries of seven of these eight officers are paid by E.E. Black, Ltd.

The corporate policies of Black are established in Honolulu by E.E. Black, Ltd. These include financial policies, reporting policies, engineering policies and procedures, and contract policies.

Amado Rosales and Roger Widdifield, two former employees of Black, filed unemployment compensation claims in Hawaii. Benefits were paid to Mr. Rosales and Mr. Widdifield.

Over eight months after Mr. Rosales filed his initial claim for unemployment benefits in Hawaii, Black requested forms from the state of Nevada for electing coverage under Nevada's unemployment insurance laws. Black commenced payment to Nevada on December 24, 1975 of unemployment insurance taxes.

The Unemployment Insurance Division, Department of Labor and Industrial Relations, State of Hawaii, on November 26, 1975 determined that all U.S. citizen-employees of Black in employment were covered under the Hawaii Employment Security Law.

Black subsequently unsuccessfully appealed this determination to the Referee for Employment Security Appeals. Further unsuccessful appeals followed to the First Circuit Court and Hawaii Supreme Court.

ARGUMENT

Appellant disputes the ruling of the Supreme Court of Hawaii that the State of Hawaii's assessment of Black Construction for unemployment insurance taxes did not violate the due process guarantee of the federal constitution. Appellant cites authority defining the constitutional limits of a state's exercise of *in personam* jurisdiction.[1/]

It is well established, however, that a state's power to tax and its power to exercise in personam jurisdiction are two different creatures, each with its own test.

1/ The following cases cited by Appellant are *in personam* cases: A.G. Bliss Co. v. United Carr Fastener Co., 213 F.2d 541 (1st Cir. 1954); Blount v. Peerless Chemicals (P.R.), Inc., 316 F.2d 695 (2d Cir. 1963); International Shoe Company v. Washington, 326 U.S. 310 (1945).

In two seminal opinions, Wisconsin v. J.C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940), and Miller Brothers Co. v. Maryland, 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954), this Court set forth the test to be applied in adjudging the constitutionality from a due process standpoint of a state's taxation of nonresidents.

In Wisconsin, supra at 444, this Court stated:

> (The sole constitutional test) for a case like the present one ... is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. (Emphasis added.)

This Court in Miller Brothers Co., supra at 344-345 also stated:

> [T]he course of decision does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax. (Emphasis added.)

Wisconsin v. J.C. Penney, 311 U.S. 435 (1940) and Miller Brothers Co. v. Maryland, 347 U.S. 340 (1954) then require some "nexus" between a state and that which it seeks to tax. Thus, in the instant case, for Hawaii to collect Black's unemployment insurance contribution, some "nexus" between Black and Hawaii must exist.

Furthermore, it should be noted that Black does not deny liability for unemployment insurance taxes. It asserts,

however, that Nevada is the proper forum to collect them.

Thus, the question is whether under the due process guarantee of the federal constitution Hawaii rather than Nevada may collect Black's unemployment insurance taxes.

Black's "nexus" with Nevada is based upon its incorporation within that state. Its activities although legal may be characterized as more fictional than factual. They are limited to the filing of statutorily mandated reports and the appointment of an agent through whom service of process may be made.

By contrast Hawaii's "nexus" with Black is more factual. It consists of the following:

(1) Black's President, Treasurer, and two Vice-Presidents reside in Hawaii.

Hawaii provides them with the protection and benefits of residency. Hawaii provides Black with the opportunity of residency for its principal employees.

(2) Black's parent company, which pays the salaries of nearly all of Black's officers, is incorporated in Hawaii. Hawaii provides it with the protection, opportunity and benefits of such incorporation.

(3) The forum from which Black establishes its corporate policies is in Hawaii. It is Hawaii which provides Black with the opportunity to establish that forum, and which protects that forum.

(4) Two former employees of Black have filed in Hawaii for unemployment benefits. It is the responsiblity of Hawaii to provide for these workers; it is

Hawaii which provides Black with the benefits attendant therewith.

Hawaii's ties with Black, then, are more significant than Nevada's. Hawaii is the proper forum to enforce Black's obligation for unemployment insurance taxes. Nevada, in fact, has specifically indicated that it has no objection to Hawaii's enforcement of the obligation.

Clearly, then, in light of Black's admitted liability for unemployment insurance taxes and Hawaii's more significant contacts with Black than Nevada, it does not violate Black's due process guarantee to have Hawaii collect its taxes.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this

cause depends is so unsubstantial as to not need further argument, and Appellee respectfully moves the Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Hawaii.

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Respectfully submitted,

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